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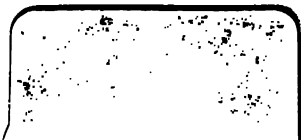
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# REPORTS OF CASES

IN

## CRIMINAL LAW,

ARGUED AND DETERMINED

IN ALL THE COURTS IN ENGLAND AND IRELAND.

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EDITED BY

EDWARD W. COX, ESQ., OF THE MIDDLE TEMPLE,

~~Barrister-at-Law.~~

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VOL. IV.

1850 to 1851.

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JOHN CROCKFORD, LAW TIMES OFFICE, 29, ESSEX STREET,  
STRAND.

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1851.

### REPORTERS.

**CRIMINAL APPEAL CASES**, before all the Judges, by **A. BITTLESTON**, I  
**CENTRAL CRIMINAL COURT**, by **B. C. ROBINSON**, Esq. ;  
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# INDEX TO CASES

REPORTED IN THIS VOLUME.

	PAGE		PAGE
D.		Reg. v. Duffy ..	24, 117, 123, 172, 294
Doc dem Bainbrigge v. Bainbrigge ..	454	— Ellis .. ..	258
		— Ely, Inhabitants of ..	281
R.		— Faderman and two others ..	359
Reg. v. Adey .. ..	208	— Fenwick .. ..	139
— Aldridge .. ..	143	— Ferrall .. ..	431
— Arundel and Smith ..	260	— Fitzsimons .. ..	246
— Austin .. ..	385	— Frances .. ..	57
— Bailey and others ..	390	— Frowen and others ..	266
— Barnet .. ..	269	— Hanson .. ..	138
— Barton .. ..	353	— Harney .. ..	441
— Baylis .. ..	23	— Harris .. ..	21, 440
— Bentley .. ..	406	— Harris and another ..	147
— Betts and others ..	211	— H. Harris and others ..	140
— Bishop of Ossory ..	159	— Hawkins .. ..	224
— Blakemore .. ..	352	— Hendy .. ..	243
— Brackett .. ..	274	— Hook .. ..	455
— Braynell and Wren ..	402	— Horne .. ..	263
— Browne .. ..	1	— Hughes .. ..	447
— Bond .. ..	231	— P. E. Hughes .. ..	445
— Boober and others ..	272	— Inhabitants of Isle of Ely ..	281
— Bubb .. ..	455	— Inhabitants of Turweston ..	349
— Byrne .. ..	248	— Jacobs and Tarrant ..	54
— Case .. ..	220	— James .. ..	90, 217
— Christopher and others ..	76	— Janson .. ..	82
— Cluderay .. ..	84	— J. T. S. Jones .. ..	198
— Cole .. ..	280	— Kenealey .. ..	345
— Coulson and another ..	227	— Kipps .. ..	167
— Craddock .. ..	509	— Langley .. ..	157
— J. Crouch .. ..	163	— Lawrance .. ..	438
— Cutts .. ..	435	— Layton .. ..	149
— G. Dadson .. ..	358	— Lowe .. ..	449
— Dewitt .. ..	49	— McAtavy and McNally ..	444
— Donovan .. ..	399	— Manning .. ..	31
— Dovey and Gray ..	428	— Matthews .. ..	93, 214
— Drake .. ..	332	— Mears and Chalk ..	423

# INDEX TO CASES.

	PAGE		PAGE
Reg. v. Miller .. .. .	166	Reg. v. Stokes .. .. .	451
— Moir .. .. .	279	— Sutcliffe .. .. .	270
— Monkhouse .. .. .	55	— Swan .. .. .	108
— Murphy .. .. .	101	— J. Taffs .. .. .	169
— Nairne .. .. .	115	— J. Thompson .. .. .	191
— Newton .. .. .	262	— Tiddeman, Bennett, and others ..	387
— O'Brien .. .. .	398	— Toshack .. .. .	38
— Ossory, Bishop of .. .. .	159	— Turberville .. .. .	13
— Otway .. .. .	59	— Turweston, Inhabitants of ..	349
— Pettit .. .. .	164	— Ulmer and Hooper .. .. .	442
— Regan .. .. .	334	— W. Watts .. .. .	336
— Roberts, Blore, and Savage ..	145	— Welch .. .. .	430
— Rook .. .. .	400	— Wiley .. .. .	412
— Rouse and others .. .. .	7	— Wilkins and another .. .. .	92
— Sansome .. .. .	203	— Williams .. .. .	87, 356
— Simmonds .. .. .	277	— Withers the younger .. .. .	17
— Simpson .. .. .	275	— Woolley .. .. .	193, 251, 255
— Smith .. .. .	42	— Woolley .. .. .	452
— Smythies .. .. .	94		

REPORTS  
OF  
**Criminal Law Cases.**

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Ireland.

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QUEEN'S BENCH.

MICHAELMAS TERM, 1849.

November 22 and 26.

(Before the full COURT.)

REG. v. BROWNE. (a)

*Pro. Sec.—Search warrant—Treasonable documents—Mandamus—  
Production of informations.*

*J. L., his house having been searched for treasonable documents, by virtue of a search warrant, applied for a mandamus to compel the justice, who had signed the warrant, to produce the informations upon which it was issued, and to permit a copy of them to be taken, supporting the application by affidavits that there was no real ground for suspicion, and that the applicant believed that whoever swore the information was actuated by malice and ill-will.*

*Held, that such writ did not lie.*

THIS was an application on behalf of John Lawless, for a conditional order that a writ of *mandamus* do issue, directed to Lieutenant-Colonel George Browne, a justice of the peace, and one of the commissioners of police for the police district of Dublin Metropolis, commanding him to produce any informations sworn before him, upon which a search warrant, signed by Lieutenant-Colonel Browne, had issued, by virtue of which police inspector

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

REG.  
v.  
BROWN.  
—  
Practice—  
Searchwarrant

Dundon had searched the house of the prosecutor for treasonable papers. From the affidavit upon which the motion was founded, it appeared that on the 21st of September last, Dundon, accompanied by certain others of the police force, proceeded to the house of Mr. Lawless at Sandy Mount, and having produced a warrant signed by Lieutenant-Colonel Browne, authorizing him to search for treasonable papers, a search was made accordingly, but no treasonable papers were discovered. Applications were made by Mr. Lawless to the secretary of the commissioners for the informations which, he stated, could not be seen, and on the 16th the commissioners' secretary wrote to the prosecutor, stating that the search warrant had issued upon sworn informations according to law, and that the commissioners did not feel justified in allowing an inspection of the informations; a formal notice having been served on the commissioners upon the 7th November, calling for the production of the informations, which was not complied with; on a former day an application for a *mandamus* having been made, it was refused to be entertained by the court, on the ground that notice had not been served upon the commissioners: notice was accordingly served, and the application was now renewed.

*O'Callaghan*, in support of the motion.—The applicant has in the strongest manner, and using the terms of the statute, denied that there were any grounds for the search, which was made in his house under the provisions of the stat. 11 & 12 Vict. c. 89, s. 2; he also states in his affidavit that he is convinced that whoever swore the information against him, was actuated by malice and ill-will, and that there were no real grounds of suspicion against him; that he is ignorant of the contents of the information, and does not know who his accuser is. If the applicant is entitled to redress, there is no means by which he can obtain the materials for bringing an action unless the court grants a *mandamus* to compel the production of the information.

CRAMPTON, J.—Do you mean to bring an action against Colonel Browne?

*O'Callaghan*.—The applicant wishes to proceed against the informer.

MOORE, J.—If a man comes before a magistrate, swearing that he has been robbed, and suspects A. B., and a search warrant issues, the man not having been robbed, how is the person affected to get at the informations?

*O'Callaghan*.—I admit that the present application is without any direct precedent, but upon principle, and from the cases which bear on the subject, I submit the writ ought to issue.

PERRIN, J.—What was the substance of the warrant?

*O'Callaghan*.—It was a warrant to search for treasonable papers.

PERRIN, J.—Did you call for a copy of it?

*The Attorney-General*.—They did not.

PERRIN, J.—Is it sworn that any such warrant issued?

*O'Callaghan*.—The commissioners' letter admits it.

PERRIN, J.—It is very much to be regretted that you did not ask for a copy of the warrant. The great difficulty I feel is not that you may not have a right of action, but that here the court is called on to issue a *mandamus* to one person in order that he may furnish documents to be used for the purposes of bringing an action against another person. I do not find any case where it has been held that such a *mandamus* would lie. That is the real difficulty in the case.

REG.  
v.  
BROWNE.  
—  
Practice—  
Searchwarrant

CRAMPTON, J.—If you can show upon principle that a *mandamus* will lie, the court will grant it though there may be no previous decision on the subject.

O'Callaghan.—It has been decided in the case of *Cooper v. Booth* (3 Esp. 135), that an action will lie for the maliciously obtaining a search warrant without due grounds. The law gives the person informed against a right of action, and to the informer it gives the protection of very stringent rules. It requires express proof, as against him, not only of want of probable cause, but also of express malice: both must conjoin. But the law does not give the informer the protection of concealment. It is against the whole spirit of the law that there should be concealment. It would be monstrous and irrational to say that a party has a remedy by action and yet never to allow him the means of finding who his secret accuser is. Take the cases of informations for indictable offences, or for the purpose of proceeding by summary conviction. As to the former, it is the right of the accused, at some stage of the proceedings, to be acquainted with the name of the person swearing against him. At common law the accused was not entitled to a copy of the informations before the trial (2 Gabb. Cr. L. 169); this hardship has been remedied by the Legislature, but in the present instance the informations and search warrant have done their work; there can be no other proceeding; and, therefore, as there will be no trial, this is a stronger case for the interposition of the court: (*Welch v. Richards*, Barnes, 468; *The King v. Smith*, 1 Str. 120.)

MOORE, J.—I see a great difficulty in the court compelling Colonel Browne to produce a document which may be made the grounds of bringing an action against himself.

O'Callaghan.—It should be presumed that the magistrate acted legally; and, if so, he cannot be prejudiced. If he has acted illegally, a fence ought not to be thrown round him to shelter him from the consequences of his own act; the privacy of home is regarded next to the protection of life and liberty. As the act of Parliament only gives the liberty to search, after informations have been sworn and laid before a magistrate, will not the restriction be illusory if no means exist of knowing whether, in point of fact, informations had ever been sworn? The case of *Ex parte a Justice of the Peace for the County of Bedford* (1 Chitty's R. 627), may be relied on as an authority against the present application, but it really is not, for Mr. Justice Bayley shows that, in that case, there was another remedy open to the applicants, but the applicant here



REG.  
v.  
BROWNE.  
—  
Practice—  
Searchwarrant

having no other legal remedy left, and having a right, the court will, by its writ of *mandamus*, afford a remedy to enforce that right.

The *Attorney-General* (Monahan) for the Crown.—It is to be observed, that the applicant has not ventured upon his oath to state what the object of the present application is, although his counsel has at the bar suggested that it is to bring an action for a malicious prosecution. I believe that the real object is to obtain a view of the informations, in order to know what other parties are implicated by them. This was not a simple case as between A. and B., but a search involving more than one individual. The police went to Mr. Lawless's house to search for treasonable papers: they were asked for their authority, and they produced a warrant to search for treasonable papers. If the application was a *bonâ fide* one, the person who swore no less than three affidavits in the case, would have ventured to pledge his oath as to what his real object was, but he has not done so; he, no doubt, has taken up the very words of the act of Parliament and denied that there were grounds for the issuing of the warrant, but he did not deny that treasonable documents had been there previous to the search. One of the causes of complaint is, that the police searched the portmanteau of a stranger whose name is not disclosed, who was stopping at Mr. Lawless's house. [CRAMPTON, J.—I understand the applicant to swear that his object is to bring an action.] He does no such thing, but it might be very convenient for him to know who are implicated by the informations. [CRAMPTON, J.—Then the *mandamus* might be only for the purpose of gratifying his curiosity], and that not for a legitimate purpose. The court are now called on to make an order which is wholly without precedent. In the case cited from *Strange*, the action had actually commenced and was ready for trial; and in the case from *Barnes's Notes* an action for a malicious prosecution had been instituted. The authorities are collected in *Tapping on Mandamus*, p. 328. In *The Queen v. The Justices of London* (5 Q. B. Rep. 555), an application for a *mandamus* to compel magistrates to give copies of informations to a prisoner remanded for further examination was refused, and Sir Fitzroy Kelly, who argued in support of the motion, rested it entirely upon the statute, and never set up any common law right to justify the demand. [PERRIN, J.—Do you certify it to be a fact that other persons' names are in the informations besides the applicants?] I do not, but I have a right to contend that it may be so.

*O'Callaghan* in reply.—No one has ventured to make an affidavit that any name is contained in the informations except that of my client. According to the principles laid down in *Magna Charta*, justice ought not to be denied to any person, but if this application be refused, my client is left without a remedy.

*Cur. adv. vult.*

November 26.—JUDGMENT.

Rsg.  
v.  
BROWNE.Practice—  
Searchwarrant

BLACKBURNE, C. J.—In this case an application was made on the part of John Lawless for a writ of *mandamus* directed to George Browne, a justice of peace for the metropolitan district of Dublin, commanding him to produce, or cause to be produced, to him (John Lawless) or his attorney, the information or informations upon oath given to him as a justice of the peace; and he further requires to be allowed to copy the information. He states a warrant to have been issued by Colonel Browne, as a justice of the peace for the metropolitan police district, and that that warrant is founded upon the sworn information of which the inspection is required, and upon which a warrant issued under the 11 & 12 Vict. c. 89, s. 2; that warrant, it is to be observed, was exhibited to the applicant by the police officer to whom it was given to be executed, and was examined before any search under it took place, and it is not now, nor was it at any time, required that it should be exhibited for inspection, or any copy of it furnished to the applicant; neither has the warrant been, as it ought to have been, submitted to the court, and we think that this omission suggests in itself a very serious objection to the present motion. The application, as I have stated, is confined to the informations, and it is contended that it is necessary for the applicant to see them in order to negative the existence of a probable cause to warrant the informations which the statute requires. His affidavits are essentially defective in not stating any purpose or object which he hopes to effect by the *mandamus* which he seeks; he neither states that he has brought any action, that he meant to do so, or that he has any cause of action. It is a settled rule that, whatever be the quality of the right of the applicant for a *mandamus*, the court must see that it has been clearly established before it grants it. If, therefore, I went no further, there would be, from a non-compliance with that rule, a decisive objection to the application; but suppose we were at liberty to allow that defect to be supplied by the suggestions which have been made by counsel at the bar, let me inquire what effect they would have had if they had been contained in the affidavit? They are in effect thus—that the applicant, by the matters to be disclosed by the return to the *mandamus*, expects to be enabled to discover whether he has sustained any injury entitling him to redress; and, if so, whether he should sue the person who made the affidavit or the magistrate who issued the warrant. These suggestions, so far from proving that he has a right to the *mandamus*, prove that he has not, for they in effect negative that which it was incumbent upon him to show, namely, that he had a clear legal and equitable right to the writ. Can he be said to have done so, when his case is that he cannot state any right at all, but that he seeks discovery of some fact, some illegality or defect at present not known nor believed to exist, but which he states may give a cause of action for a proceeding which we have

Judgment.

REG.  
v.  
BROWNE.  
—  
Practice—  
*Searchwarrant*

Judgment.

no sufficient reason to doubt was done according to the due course of law? It is further observable, so far as regards the magistrate who took the informations, that there is no impediment to the prosecutor bringing an action in which the legality of his conduct may be questioned, and it is admitted that the court could not grant a writ to compel a magistrate to furnish evidence against himself, or to disclose evidence which he should adduce in his own vindication if an action were brought against him. This has obliged the prosecutor's counsel to rest his case upon the broad ground of an absolute right, without specifying any definite purpose or object, or stating any legal right, to be permitted to inspect the informations; for that no authority has been cited; on the other hand, there is the authority of the Court of Queen's Bench in the case of *The King v. A Justice of Bedford* (1 Chitty's Reports, 627), that an application for a *mandamus* to compel the production of informations to ground an indictment for perjury was without precedent, and that the court had not by law any power to grant it. The authorities cited from Barnes's Notes and Strange's Reports, which, it is said, are at variance with this decision, are not really so, neither is the case of a *mandamus*, and in both, legal proceedings and trials were pending, upon which the informations were ordered to be given in evidence. The difference between those cases and the present is so obvious, that it is not necessary to do more than advert to it. Here, there neither is any suit pending, nor has any step been taken to institute a suit. Upon the whole of the case, if we granted the present application for a *mandamus*, we should do so, not only in the absence of authority, but against authority and against the settled rules of this court: rules not merely technical or made for the convenience of practice, but founded upon the nature of that high prerogative writ and adopted for the very salutary purpose of limiting its use to cases to which it is properly applicable, and for the purpose of preventing the abuse which would necessarily and inevitably arise from issuing it at the instance of parties who do not show actual legal rights to be remedied. Therefore we pronounce no rule upon this motion.

## OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES.

July 27, 1849.

(Before Mr. Justice ERLE.)

REG. v. WILLIAM ROUSE, SAMUEL BILLINGSLEY, and JOSEPH BAYES. (a)

*Forgery — Warrant or order for the payment of money — Unlawful societies — Indictment — False pretence.**The mutual promises and engagements of any society are "authorized by law," within the 57 Geo. 3, c. 19, s. 25, unless they are clearly prohibited by law, and the party objecting to the legality of such promises or engagements must show their illegality.**In order to constitute the crime of forgery of a warrant or order for the payment of money under the 11 Geo. 4 & 1 Will. 4, c. 66, s. 3, it is necessary that the instrument be such that, if genuine, it would, in the ordinary course of business between the parties, be effectual for the payment of money.**By the rules of a society of Odd Fellows, having a branch called the "Conqueror Lodge," the family of deceased members of the branch lodge became entitled to a sum of money on the presentation of a certificate (filled up according to a certain form) to the secretary of the head society. After the dissolution of the "Conqueror Lodge," a forged certificate purporting to relate to the death of a member of that lodge, was presented to the secretary, and a sum of money paid under it. Held, that an indictment for forging or uttering the certificate could not be sustained, there being, at the time it was forged and uttered, no such branch lodge or society in existence.**Where, in an indictment for obtaining money by false pretences, under the above circumstances, it was alleged that the false pretences were made to A. B., and by means thereof the money obtained from the said A. B.**Held, that this averment was supported by evidence that the above mentioned false certificate was presented by the defendants to A. B., the secretary of the lodge, and that he accompanied them to C. D., the treasurer, from whose hands the money was received; he being merely the mechanical medium, and the secretary the responsible party.*

IN the first count of the indictment, the prisoners were charged with forging a certain warrant for the payment of money, with intent to defraud one Richard Mills. In the second count, they were charged with uttering a warrant with intent to defraud the same party. The third and fourth counts were similar to the first and second, except that the intent was laid to defraud Henry Corser Insoll. There were four other counts describing the instrument as an order for the payment of money.

It appeared in evidence that a district lodge of the society of

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

REG.  
v.  
ROUSE  
AND OTHERS.  
—  
Forgery—  
False pretences

"Odd Fellows" existed at Wordesley in Staffordshire, having branch lodges at various places, among others, one at Kidderminster in Worcestershire, nine miles from Wordesley, and called "The Conqueror Lodge." By the rules of the society, on the death of a member of any branch lodge, his family became entitled to a sum of money, varying according to the length of time he had been a member and other circumstances. Each lodge was provided with printed forms of certificate of the death of members, and by the rules of the lodge it was requisite, before any money could be paid to the family, that this certificate, or, as the rules termed it, "cheque," should be filled up with the name and dates of the death and of the admission of the deceased member, and signed by the officers of the lodge, namely, by the *Noble Grand*, the *Vice Grand*, and the *Secretary*. The certificate so filled up had to be transmitted to the chief secretary at Wordesley one clear day at least before the money was required. The secretary there, if it appeared to be correct, presented it to the treasurer, who handed over the amount due to the family of the deceased member.

Case.

On the 17th of February, 1849, a meeting of the Conqueror Branch Lodge was held at Kidderminster, at which meeting the three prisoners, who were members, were present. It was then determined that the branch lodge should be broken up, and a new society formed independent of the chief lodge at Wordesley. The Conqueror Lodge was accordingly on that day dissolved, and the funds in hand distributed among the members, including the prisoners, the sum of five shillings being retained from each member's share, in order to form a new club.

On the 26th of the ensuing month of March, a meeting was held to form the new club, at which the prisoners were present, and Rouse was heard to say to a person of the name of Martin, who had been the *Noble Grand* of the *Conqueror Lodge*, and in that capacity held the cheque book containing the printed forms of certificate before mentioned, "If you will give me a cheque out of the book, I will do the trick;" and Martin thereupon handed the cheque book to him.

On the 11th of April, the three prisoners and Martin (not in custody) went to Mr. Insoll, the secretary at Wordesley, and presented the following certificate to him, the words in *italics* and figures between brackets being written and the rest printed.

#### "CONQUEROR LODGE.

"This is to certify that Brother *Jno. Higham*———(or wife) *Labourer*, resident at *Kidderminster*, died the [10th] day of *April*, 18[49]. He was initiated a member the [1st] day of *May*, 18[45], and was clear upon the books of the Lodge at the time of *his* death. Certified by us this [11th] day of *April*, 18[49].

"*Wm. Jones*, N. G.

"*John Baxter*, V. G.

"*William Pool*, Secretary.

"The above certificate must be signed separately by the officers of the lodge, and must be forwarded to the C. S. of the district at

least one clear day before the time of the money being required, which regulation will and must be strictly abided by."

The secretary did not doubt the genuineness of the "cheque," not having been informed of the dissolution of the Conqueror Lodge in the previous February. This was accounted for by the fact that no meeting of the chief lodge had been held in the mean time, the quarterly meeting being fixed for the 24th of April. The secretary was also ignorant of the names of the officers of the Conqueror Lodge, no money having been drawn out of the treasurer's hands during the short time the lodge was in existence. The prisoners represented to Mr. Insoll that they were members of the Conqueror Lodge; that John Higham had died of fever, and the money was wanted to provide for his funeral immediately; and in consequence of this representation, the secretary waived the rule expressed at the foot of the certificate, and accompanied the prisoners to the residence of Mr. Mills, the treasurer, who, upon the facts stated, and being equally ignorant with the secretary of the dissolution of the branch lodge, paid 16*l*., the amount to which the family of a member was entitled under the circumstances mentioned in the certificate. Martin signed the receipt book and took up the money, and left the room accompanied by the prisoners.

It was proved that there had not been any such persons, either members or officers of the Conqueror Lodge, as those purporting to sign the "cheque" or certificate, and that the name of the alleged deceased member, and, consequently, his death, also, were equally fictitious; and evidence was given showing that the names of Baxter and Pool in the cheque were in the handwriting of the prisoner Rouse.

The rules of the Wordesley District Lodge, which were identical with those of the Conqueror Lodge, were put in. From them it appeared, that the members entered into an engagement to abide by the rules, and one of the rules was to keep the secrets of the society. The secretary of the lodge, however, stated, on cross-examination, that there were not now any secrets to keep, as all secrets were abolished. It appeared that the Conqueror Lodge had not been enrolled.

On the close of the case for the prosecution,

*Skinner* (for the prisoners), objected that this was an illegal society, and was within the prohibitory statutes, 37 Geo. 3, c. 123, s. 1, and 57 Geo. 3, c. 19, s. 25.

The 37 Geo. 3, c. 123, s. 1, (a) prohibited oaths and engagements

(a) "Whereas divers wicked and evil disposed persons have of late attempted to seduce persons serving in His Majesty's Forces by sea and land, and others of His Majesty's subjects, from their duty and allegiance to His Majesty, and to incite them to acts of mutiny and sedition, and have endeavoured to give effect to their wicked and traitorous proceedings, by imposing upon the persons whom they have attempted to seduce the pretended obligation of oaths unlawfully administered, be it enacted, &c., that any person or persons, who shall in any manner or form whatsoever administer or cause to be administered, or be aiding or assisting at, or present and consenting to, the administering or taking of any oath or engagement purporting or intending to bind the person taking the same to engage in any mutinous or seditious purpose; or to disturb the public peace; or to be of any association, society, or confederacy formed for any such purpose; or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander or other person not having authority by law for that

REG.  
V.  
ROUSE  
AND OTHERS.  
—  
Forgery—  
False pretences.

Case.

REG.  
v.  
ROUSE  
AND OTHERS.

Forgery—  
False pretences.

to bind parties to engage in any mutinous or seditious purposes &c., or to obey the orders or commands of any committee or body of men not lawfully constituted, &c., or not to reveal or discover any illegal act done or to be done, or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person, &c. By the 57 Geo. 3, c. 1 s. 25, (a) all societies, the members whereof are required to take an oath or engagement within the 37 Geo. 3, c. 123, or the 52 Geo. 3, c. 104 (which latter statute made it a capital felony to administer an oath or engagement to commit treason or murder, &c.) or to take any oath not required or authorized by law, are deemed guilty of an unlawful combination, within the statute 39 Geo. 3, c. 79. It has been held that the statute 37 Geo. 3, c. 123, was not confined to oaths administered with either a mutinous or seditious object (*Rex v. Ball*, 6 C. & P. 563; *Rex v. Lovell*, 1 M. & Rob. 349, 6 C. & P. 596.) In the present case the parties bound themselves together to abide by certain rules and engagements which could not be said to be "required" or "authorized" by law.

ERLE, J.—The societies contemplated by the 37 Geo. 3, c. 123 are very different from the one in question. That act recites that "whereas divers wicked and evil disposed persons have of late attempted to seduce persons serving in His Majesty's forces by sea and land, and others of His Majesty's subjects, from their duty and allegiance to His Majesty, and to incite them to acts of mutiny and sedition, and have endeavoured to give effect to their wicked and traitorous proceedings by imposing upon the parties whom they have attempted to seduce, the pretended obligation of oaths unlawfully administered, be it enacted," and so forth. Then came the

purpose; or not to inform or give evidence against any associate, confederate, or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done or to be done; or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to do any other thing which may be deemed or proved to be contrary to law; or to do by any other person or persons, or the import of any such oath or engagement; shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for a term of years not exceeding seven years, and every person who shall take any such oath or engagement, not being compelled thereto, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years.

(a) "And be it further enacted, that from and after the passing of this act, all and every of the said societies or clubs, and also all and every other society or club now established or hereafter to be established, the members whereof shall be required or admitted to take any oath or engagement which shall be an unlawful engagement within the meaning of [37 Geo. 3, c. 123, 52 Geo. 3, c. 104] or to take any oath not required or authorized by law; and every society or club, the members whereof or any of them shall take or in any manner bind themselves by a such oath or engagement on becoming, or in order to become, or in consequence of being a member or members of such society or club; and every society or club the members or a member whereof shall be required or admitted to take, subscribe, or assent to, or shall take or assent to, or assent to any test or declaration not required or authorized by law, in whatever manner or form such taking or assenting shall be performed, whether by words, signs, or otherwise; either on becoming or in order to become, or in consequence of being a member or members of any such society or club; and every society or club that shall elect, appoint, nominate, or employ any committee, delegate or delegates, representative or representatives, missionary or missionaries, to meet, confer, or communicate with any other society, &c. shall be deemed and taken to be unlawful combinations and confederacies, within the meaning of an act passed in the 39th year of the reign of His present Majesty, intituled, *An Act for more effectual Suppression of Societies established for Seditious and Treasonable Purposes, and for better preventing Treasonable and Seditious Practices*, and shall and may be prosecuted, proceeded against, and punished, according to the provisions of the said act," &c.

57 Geo. 3, c. 19, s. 25, which makes societies within the former statute unlawful combinations, as well as all other societies the members whereof are required to take any oath not required or authorized by law. Now I know no limits to engagements, unless there is a positive law to the contrary. Any mutual promise or engagement is authorized that is not prohibited. The subjects of this realm may make any engagement they please, unless clearly prohibited by law, and the party objecting to the legality of an engagement must show that it is illegal. That has not been done in this case, and therefore the objection cannot prevail.

R.R.O.  
v.  
BOUSER  
AND OTHERS.

Forgery—  
False pretences.

*Skinner* then submitted that the document alleged to have been forged was not a warrant or order for the payment of money within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 3. There was nothing on the face of the instrument showing an obligation or duty on the parties to whom it was uttered to pay money thereupon. Moreover, in this case there was not any such lodge as the Conqueror Lodge, neither any officers of it, of the names alleged, in existence.

Whether  
instrument was  
a warrant or  
order for  
payment of  
money.

*Whitmore* and *Cope* (for the prosecution), cited *Reg. v. Rogers*: (9 C. & P. 41.) There the forged paper was as follows:—"This is to certify that R. R. has swept the flues and cleaned the bilges and repaired four bridges of the Princess Victoria. J. N. 4l. 0s. 10d.," and evidence was given to show that by the course of dealing between the parties, this voucher, if genuine, would have authorized L. and Co. to pay the 4l. 0s. 10d.; and it was held that this was a warrant for the payment of money within the statute. *Bosanquet J.*, in giving judgment, said, "It has been proved that this was the mode of transacting business that had been usual with the parties, and this, provided it had been a genuine voucher, would have properly authorized the payment of the money. I think that enough has been shown to sustain this indictment. [ERLE, J.—That case appears to be in point as far as the question whether an instrument in this form might be a warrant within the statute, but there, there was in fact such a course of business as would make the document effectual, if genuine; but here there was no Conqueror Lodge in existence, and the order, if genuine, was of no force.] That objection would apply to cheques where the name of a fictitious person was used. "If the order purport to be one which the party has a right to make, although in truth he had no such right, and although no such person as the order purports to be made by, existed in fact, it falls within the penalty of the statute:" (Russell on Crimes by Greaves, vol. 2, p. 520.) Whether the name forged be that of a merely fictitious person who never existed, or of a person actually existing, is wholly immaterial. It is as much a forgery in the one case as in the other, provided the fictitious name be assumed for the purpose of fraud in the particular instance in question: (Archbold's Pleading and Evidence in Criminal Cases, 10th edit., p. 359.) [ERLE, J.—No doubt an instrument in this form, "The bearer has laid three courses of masonry," might be shown to be a warrant for the payment of money as between the parties. So in the present case,



REG.  
v.  
ROUSE  
AND OTHERS.  
—  
Forgery—  
False pretences.

although no stranger would understand the instrument to be an order or warrant for the payment of money, it might be shown by extrinsic evidence that in the course of business between the parties, it was such a warrant or order. (a) Here, however, there is no society existing, no course of business authorizing such a payment as was made. The Conqueror Lodge had ceased to exist. If the words "Roman Lodge" or "Parisian Lodge" had been used, would it then have been valid? How can you make that an order or warrant, which, if all the names of persons mentioned in it were true, would yet be of no force?] Where a prisoner had been convicted for forging an order for the payment of prize-money, and it appeared that the party whose name was forged was a discharged seaman, and was at the time the order bore date within seven miles of the port where his wages were payable, under which circumstances his genuine order would not have been valid, by the provisions of the 32 Geo. 3, c. 34, s. 2, unless made in the manner therein prescribed; yet, the judges held the conviction to be proper, the order itself purporting on the face of it to be made at another place beyond the limited distance: (*M'Intosh's case*, 2 East, P. C. c. 19, s. 39, p. 992; 2 Leach, 883, cited in Russell, by Greaves, vol. 2, p. 526.)

ERLE, J.—I can reserve the point if I think it necessary.

The case then went upon the facts to the jury, who found *Rouse* guilty of forgery, and the other prisoners of uttering.

False pretences.

The prisoners were then tried upon an indictment charging them with obtaining from Richard Mills, by means of a false pretence to him, the sum of 16*l*., with intent to defraud the said Richard Mills. In a second count of the indictment the false pretences were alleged to be made to, and the money obtained from, Henry Corser Insoll, with intent to defraud him.

The evidence was the same as that given on the trial for forgery. It appeared, however, that Mr. Mills, the treasurer of the society, could not speak positively as to whether Bayes was present at the time the money was handed over to the others.

*Skinner* (for the prisoners), objected that the evidence did not support the indictment. The evidence was of a false pretence to Henry Corser Insoll, by means of which the money was obtained from Richard Mills. The pretence, therefore, was to Insoll, while the money was obtained from Mills. The indictment, however, alleged the pretence to be made to, and the money obtained from, the same party, namely, in the first count the pretence to be made to Richard Mills and the money obtained from *him*, and in the second count the pretence to be made to Henry Corser Insoll, and the money obtained from *him*, but

ERLE, J.—Mills is the treasurer who disposes of the money of the society on receiving certificates from Insoll, who is the responsible party. The defendants go to Insoll, and Insoll goes to the mechanical instrument, the treasurer, and the latter produces the money. I think it is correctly stated that Insoll paid the money,

(a) See *Reg. v. Turberville*, post.

and that it was obtained from him. The second count of the indictment is therefore correct.

*Skinner* then objected that the offence amounting to forgery, the parties could not be indicted for false pretences (*Rex v. Evans*, 5 C. & P. 553; *Russell on Crimes*, by Greaves, vol. 2, p. 309), but

ERLE, J.—I am satisfied that this was not a forgery within the statute.

The Jury returned a verdict of *Guilty* against Rouse and Bilingsley, who were sentenced upon this indictment. Bayes was acquitted and discharged, no judgment being given against either of the parties on the conviction for forging and uttering.

REG.  
v.  
ROUSE  
AND OTHERS.  
—  
Forgery—  
False pretences.

## OXFORD CIRCUIT.

### MONMOUTHSHIRE SUMMER ASSIZES.

August 6, 1849.

(Before Mr. Justice ERLE.)

REG. v. TURBERVILLE. (a)

*Forgery—Order or warrant for the payment of money—Indictment—Intent to defraud.*

An instrument in the following form: "Please to pay T. E. Turberville 3l. 12s. 6d. for sick-pay paid to Brother Isaac Jones," and signed by the officers of a friendly society, and directed to the treasurer, is, on the face of it, an order within the stat. 11 Geo. 4 & 1 Will. 4, c. 66, s. 3; and may be shown by evidence to be a warrant for the payment of money, within the same statute.

Where a prisoner was charged with forging the above instrument, and some counts of the indictment laid the intent to be to defraud "J. C. and others," by virtue of the 11 Geo. 4 & 1 Will. 4, c. 66, s. 28, and it appeared that the prisoner, and J. C. and others, were members of the society:

Held, that the word "others" might be held to include or exclude the prisoner, according as it was necessary, for the support of the indictment, that his name should be considered as included or excluded.

Other counts of the indictment laid the intent to be to defraud W. R.

Held, that this intent was supported by proof, that W. R. was the treasurer of the society, and that it was the course of business and his duty to pay money, on having genuine orders or warrants for that purpose, in the above form.

THE prisoner, Thomas Edward Turberville, was indicted for forging a certain order for the payment of 3l. 12s. 6d.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

REG.  
v.  
TURBERVILLE.  
—  
Forgery—  
Warrant or  
order—Indict-  
ment.

There were twenty-four counts in the indictment. In some of them the instrument was described as a warrant for the payment of money, and in others the prisoner was charged with uttering knowing it to be forged. The intent was also variously laid in some counts stating it to be done with intent to defraud "William Rees," and in others with intent to defraud "Jacob Chatterley and others."

It appeared in evidence that the prisoner was a member and paid *Actuary* of a society of Odd Fellows at Newport, called "The Temple of Peace Lodge." By the rules, a sick member was entitled to an allowance out of the funds of the society. The course of business on such an occasion was for the sick member to apply to the actuary, who drew out an "order" or "cheque" on the treasurer of the society for the amount to which the sick person was entitled. Upon this order being signed by the "Noble Grand" of the society it became the duty of the treasurer to pay the amount mentioned in it.

On the 10th of March, 1849, the prisoner brought an order from Mr. Jacob Chatterley, the "Noble Grand," for his signature stating that he had received a communication from Isaac Jones, a member of the society, saying he was sick and wanted some money. The prisoner then requested Mr. Chatterley to sign the "order" or "cheque," which he did. The sum mentioned in it, which he signed it, was twelve shillings and sixpence only.

On the same day the prisoner took the "cheque" to Mr. William Rees, the treasurer. It then appeared to be for the sum of 3*l.* 12*s.* 6*d.* The cheque was produced, and was in the following form:—

"10th March, 1849, Newport.

"Mr. W. Rees,—Please to pay P. G. T. E. Turberville  
[Three] [3*l.*] 12*s.* 6*d.* for sick pay paid to Brother Isaac Jones.

(Signed) JACOB CHATTERLEY, N. G.

T. E. TURBERVILLE, P. G. Actuary.

"[£3.] 12*s.* 6*d.* Newport, 10th March, 1849."

The word and figures *Three*, between brackets, were added after the cheque was signed by Chatterley; therefore it was presented to the treasurer, who paid the sum of 3*l.* 12*s.* 6*d.* to the prisoner.

Isaac Jones, the only member of the society of that name, was called, and stated that he was at Coventry in the month of March, and had not made any application to the prisoner or the society for money, neither had he received any.

Evidence was given to show that the alteration in the "cheque" was in the handwriting of the prisoner.

At the close of the case for the prosecution,

*Huddleston* (for the prisoner), submitted that the instrument was not an "order" or "warrant" for the payment of money within the meaning of stat. 11 Geo. 4 & 1 Will. 4, c. 66, s. 3, but was simply a "request

The words of the document were, "Please to pay," and there was no obligation on the part of Mr. Rees to pay it; but

REG.  
v.  
TURBERVILLE.  
—  
Forgery—  
Warrant or  
order—Indict-  
ment.

ERLE, J.—Bankers' cheques are often in the same form, and make use of the words "please to pay," but they are not less orders for the payment of money. The same instrument may be of all three descriptions. The one in question is a warrant, and an order, and request. Upon the face of it it is an order, and by the evidence it is a warrant.

*Huddleston* then submitted that the intents mentioned in the indictments were not supported by the evidence. First, as to the counts which laid the intent to be to defraud "Jacob Chatterley and others." The prisoner was himself a member of the society, and was therefore interested in the money in the hands of the treasurer, and a fraud upon the society was a fraud upon him. He could not be indicted for a fraud upon himself. [ERLE, J.—The question is, who was the party intended to be defrauded? This is analogous to the case of a member of a bank.] Supposing A., B. and C. jointly lodge money at a bank, and A. draws a cheque in the name of himself and the others, an indictment charging the intent to be to defraud B. and C. may be good, but an indictment charging the intent to be to defraud A., B. and C. would be bad. Formerly, in indictments for larceny where there were several joint-owners, every one had to be named. The 7 Geo. 4, c. 64, s. 14, remedied this inconvenience, making it sufficient to state the name of one of such owners, and to allege the subject-matter of the indictment to be the property of him and "another" or "others," as the case might be. There was a similar provision with regard to indictments for forgery. The indictment, however, in either case must be read as if the name of every owner or party interested were inserted. The name of the prisoner, therefore, must be taken to be included by the word "others." Secondly, with regard to the counts in which the intention is said to be to defraud the treasurer; the stat. 10 Geo 4, c. 56, s. 21, which allows the money and effects of societies to be described as the property of the treasurer or trustee, only applies to such societies as are duly enrolled. Moreover, no action would lie against the treasurer for money paid under the circumstances.

*W. H. Cooke* (for the prosecution), called attention to the stat. 11 Geo. 4 & 1 Will. 4, c. 66, s. 28, by which it is sufficient in any indictment for forgery to name one person only, when the intent is to defraud a company, society, or number of persons, and to allege the offence to have been committed with intent to defraud the person so named, and another or others, as the case may be. There is a distinction between the provisions relating to the description of the owners of property, and the above statute, as to the parties intended to be defrauded.

ERLE, J.—In indictments for forgery, it was formerly necessary Judgment. to mention the names of all the parties intended to be defrauded. Now, it is only necessary to mention the name of one such person, and allege the intent to be to defraud such person and another or others, as the case may be. Now, without this provision, it would

REG.  
v.  
TURNBULL.  
—  
Forgery—  
Warrant or  
order—Indict-  
ment.

in this case either have been necessary to mention the name of the prisoner or it would not. If he ought to be included, I should hold, as the ends of justice might require, that he is included in the word "others." On the other hand, if he ought not to be so included, he is not included. As to the objection to the other counts, the evidence, I think, shows a fraud upon "William Rees," call him treasurer, or what you will. He is bound to have a genuine voucher for his payments. As at present advised, I think the document in question would not be any protection to him as to 3*l*, the part forged, that is to say, the difference between 12*s*. 6*d*., and 3*l*. 12*s*. 6*d*.

The case then went to the jury, and the prisoner was convicted.

[In the case of *Reg. v. Rouse and others, ante*, p. 7, it was held that the secretary, and not the treasurer of a similar society, was the party in law defrauded by a false "cheque," or order. There is, however, no discrepancy between the *dictum* of the learned judge in each case, for it will be observed that in the case referred to, the evidence and the rules of the society differed materially from the present. The order in the former case was, by the rules of the society, presented to the secretary in the first instance, whose duty it was to examine the document, and then present it to the treasurer to be cashed, the latter officer being relieved from responsibility by the previous supervision of the secretary.—J. E. D.]

## OXFORD CIRCUIT.

## MONMOUTHSHIRE SUMMER ASSIZES.

*August 6, 1849.*

(Before Baron ROLFE.)

REG. v. WILLIAM WITHERS, the younger. (a)

*Practice—Quashing indictment—Offence of uttering forged instrument at Common Law—Perjury—Variance—Evidence.**The court will not, on the application of the defendant, quash an indictment for perjury. An indictment cannot be quashed in part.**Quære, Is the uttering a forged instrument with intent to defraud, without actual fraud being the result, any offence at common law?**An indictment for perjury at a county court, alleged that a certain plaintiff, wherein W. W. "the younger" was plaintiff, &c., was tried. In the plaintiff book the plaintiff was described simply as W. W.**Held, no variance.**The variance of a letter in a warranty set out in a count for uttering it with intent to defraud, is one that can and may be amended by direction of the judge at the trial, independently of the statute 11 & 12 Vict. c. 46, s. 4.**An indictment for perjury alleged that the defendant swore that certain words were written by I. S. at the house of M. P. in the parish of S. M., &c., on, &c., whereas, in truth and in fact, the said words I. S. were not written by the said I. S. at the house of the said M. P., in the parish of S. M., on, &c.**Held, that this averment was supported by proof that the defendant swore that the words were written at the house of M. P., but that he did not describe the situation of the house, or mention the name of the parish.*

THE defendant was indicted for, "that heretofore, to wit, on the 18th day of April, A.D. 1849, at the county court of Monmouthshire, at Newport, in the said county, a certain plaintiff, wherein William Withers the younger was plaintiff, and Isaac Sargent was defendant, was tried before John Maurice Herbert, Esq., the judge of the said court, and the said plaintiff, by the said Indictment. plaintiff, demanded damages to an amount not more than 20*l.*, for a certain breach of contract by the defendant; and the said defendant was then dwelling in the district within the jurisdiction of the said court, and the matter of the said plaintiff was within the jurisdiction of the said court; and upon the said trial the said

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

REG.  
v.  
W. WITHERS.  
—  
*Perjury—  
Indictment—  
Practice—  
Uttering of a  
forged instru-  
ment.*

William Withers the younger, late of, &c., was then and there examined upon oath, and duly sworn before the said judge to speak the truth touching the matter then in question between the said W. W. and the said I. S.; and on the said trial it was a material question whether the words Isaac Sargent, on a certain paper then produced and shown to the said judge, had been written by the said Isaac Sargent or not, and the said W. W. intending to aggrieve the said I. S., the defendant in the said plaint, then and there on the said trial falsely, corruptly, knowingly, and wilfully swore that the said paper was signed by the said I. S., and that the said W. W. saw the said I. S. write the said words 'Isaac Sargent' on the said paper, whereas, in truth and in fact, the said paper was not signed by the said I. S.; and on the said trial it was also a material question whether the said words 'Isaac Sargent' were written by the said I. S. at the house of one Margaret Pearce, in the parish of Saint Mellons, in the county of Glamorgan, on the 29th day of February, A.D. 1848, and the said W. W. intending to aggrieve the said I. S. then and there on the said trial, falsely, corruptly, knowingly, and wilfully swore that the said words 'I. S.' were written by the said I. S. at the house of one Margaret Pearce, in the parish of St. Mellons, in the county of Glamorgan, on the 29th day of February, A. D. 1848. Whereas, in truth and in fact, the said words 'I. S.' were not written by the said I. S. at the house of the said M. P. in the parish of St. M., on the 29th day of February, A. D. 1848." Then followed a third assignment of perjury, the perjury assigned being that W. W. swore "that the said words I. S. were written by the said I. S. at a public-house called the White Hart, in the said parish of Saint Mellons, with ink supplied by a female servant, who was then waiting on the customers in the said public-house." There was a fourth assignment on the averment that the said W. W. swore "that the said words 'Isaac Sargent' were written by the said I. S. in the presence of one Thomas Richards."

A second count alleged that on the trial of the said plaint, the said William Withers "unlawfully and fraudulently did publish and give in evidence, in support of the said plaint, a forged writing in the words and figures following, that is to say:—

'February 9th, 1848.

'St. Mellons, near Cardif, Wm. Withers bought a brown mare warented sound and good in harnis Mr. Sargent Machin.

'Price £23: 17s.

'ISAAC SARGENT.'

with intend to defraud the said I. S.; the said W. W. at the time he so published and gave in evidence the said writing on the said trial, well knowing the same to be forged, whereby the said I. S. was defrauded of a large sum of money, to wit," &c.

There was a third count similar to the second, but merely alleging the intent to defraud, without the averment that the said I. S. was defrauded.

Motion to quash  
indictment.

*Huddleston* (for the defendant), applied to quash the 1st and 3rd counts of the indictment. The first, on the ground that there was no averment in the indictment that the oath upon which the defendant

was charged with committing perjury was administered by a party having competent authority to do so in the particular case alleged. The objection to the third count was that it showed no offence in law. It simply charged the uttering of a forged instrument not the subject of any legislative enactment, and the mere uttering a forged document is no offence at common law, unless fraud be alleged and proved. But, by

REG.  
v.  
W. WITHERS.  
—  
Perjury—  
Indictment—  
Practice—  
Uttering of a  
forged instru-  
ment.

ROLFE, B.—Your application is to quash part only of the indictment, which cannot be done. Moreover, an application to quash an indictment comes from the prosecution, not from the defendant. The case had better proceed, and any objection to the indictment can be heard, if necessary, after the facts are ascertained.

*Smythies*, then, for the prosecution, then stated the case to the jury, and called witnesses in support of it. It appeared that, in February 1848, Isaac Sargent had sold a horse to the defendant William Withers. The horse subsequently died, and Withers, in April 1849, brought an action against Sargent in the Montmouthshire County Court for breach of an alleged warranty, and upon the trial produced in evidence the document the subject of the present indictment. The Plaint Book of the County Court was put in evidence. A plaint, dated the 9th of April, 1845, appeared there, in which, under the head or column of "Plaintiff" was "William Withers, plaintiff."

*Huddleston* objected that this was a variance. The indictment alleged that "a certain plaint, wherein William Withers the younger was plaintiff, and Isaac Sargent was defendant, was tried," &c. There was not, as it now appeared, any such plaint.

ROLFE, B.—Can the averment in the indictment be construed to mean that a certain plaint in which William Withers the younger described as William Withers the younger, was plaintiff? As at present advised, I think not, and therefore William Withers, mentioned in the Plaint Book, may be shown to be the same person as William Withers the younger now at the bar. I will reserve the point, however, if necessary.

The alleged warranty was produced. In it the word "harness" was spelt "harniss."

*Huddleston* submitted that this was a variance from the instrument set out in the second and third counts of the indictment, where the word was spelt "harnis;" but, per

ROLFE, B.—I shall order the indictment to be amended. It is such a variance as might be amended in cases of misdemeanor, independently of the stat. 9 Geo. 4, c. 15, and therefore, in felonies, independently of the 11 & 12 Vict. c. 45. Amendment of  
indictment.

Mr. Herbert, the judge of the County Court, proved the evidence on oath by the defendant at the trial. It corresponded with the averments in the indictment. The defendant swore that the body of the warranty was written by him immediately before it was signed by Sargent. The signature appeared, however, to be in a differently coloured ink. The defendant did not, however, describe Margaret Pearce's house as situated in the parish of St. Mellons.



REG.  
v.  
W. WITHERS.  
—  
Perjury—  
Indictment—  
Practice—  
Uttering of a  
forged instru-  
ment.  
—  
Evidence.

*Huddleston* contended that the evidence did not support the second assignment, which alleged that the defendant swore that the signature was written by Sargent at the house of Margaret Pearce, in the parish of *St. Mellons*. It was not alleged by way of inuendo, but that the defendant said all this. The third assignment also made these words material; but, per

ROLFE, B.—I think that the allegation may be well made out by showing that Margaret Pearce's house is in the parish of *St. Mellons*.

Mr. Herbert stated, on cross-examination, that he was of opinion that a verbal warranty of the horse was proved on the trial, independently of the written warranty.

Evidence was then given in support of the assignment of perjury. Isaac Sargent was called, and swore that the signature to the warranty was not in his handwriting, that he never gave the defendant any warranty for the horse in question, and that he did not spell his name *Sargent*, but *Sarjeant*. He admitted that he was with the defendant at Margaret Pearce's house on the 29th of February, and there sold the horse. He also said that the name on his waggons might be spelt as in the alleged warranty. Two female servants, living at the house at the time, swore that they did not see any pen or ink on the occasion, neither were they applied to for any ink by the defendant or by Sarjeant. There were, however, pens and ink in the house, and possibly in the room where the parties were sitting. Some evidence was given to disprove the signature being the handwriting of Sarjeant, but not of a very satisfactory kind.

At the close of the case for the prosecution,

Uttering forged  
document.

*Huddleston* submitted that there was no evidence of two witnesses to support the assignment of perjury.

ROLFE, B.—I do not see that there is.

*Smythies* submitted that it was not necessary that two witnesses should disprove the assignment if the facts were corroborated by other circumstances. Here, in addition to the denial of Sarjeant, was the colour of the ink, and the evidence as to the handwriting.

ROLFE, B.—Each assignment must be proved by evidence of two witnesses. I cannot say there is no evidence, but I think there is no evidence on which the jury can rely.

*Smythies* then submitted that the case must go to the jury on the counts for uttering the forged warranty with intent to defraud.

*Huddleston*.—No fraud has been proved, as it is admitted that a parol warranty was proved on the trial which would have entitled the present defendant to a verdict in the County Court action, and uttering a forged document is no offence at common law, unless actual fraud be the result. That was so held by Mr. Justice Cresswell at the Summer Assizes for Oxford, in 1848, in the case of *The Queen v. Bolt*.

ROLFE, B.—I should not like to hold that, because a man has got a parol warranty he is at liberty to utter a forged written one,

unless it were so expressly ruled and distinctly laid down; but in this case I think there is not in fact any confirmation at all of Sarjeant's evidence. The servants only say they saw no pen and paper on the occasion in question, and, although on the counts for fraud there may not be the same legal requisites of evidence as in the count for perjury, it cannot be supposed that the jury would draw this distinction.

His Lordship then directed an acquittal.

REG.  
v.  
W. WITHERS.  
—  
Perjury—  
Indictment—  
Practice—  
Uttering of a  
forged instru-  
ment.

## OXFORD CIRCUIT.

### GLOUCESTER SUMMER ASSIZES.

August 8, 1849.

(Before Mr. Justice ERLE.)

REG. v. HARRIS. (a)

*Practice—Admission to bail.*

*Where, after conviction by a jury at an Assizes, questions of law have been reserved for the Court of Criminal Appeal, the prisoner will not be admitted to bail without the assent of the judge before whom he was tried.*

**H**UDDLESTON applied to his Lordship to admit a prisoner, named Harris, to bail under the following circumstances:

The prisoner was indicted at the last Spring Assizes for the county of Gloucester for an offence under the bankrupt laws, for not disclosing all his property on his examination. He was convicted; but in the course of the trial certain objections were taken to the indictment, which Baron Platt, before whom the prisoner was tried, reserved for the consideration of the Court of Criminal Appeal, and no sentence was passed upon the prisoner at the time. The case came on for argument in Easter Term, when Chief Baron Pollock presided at that court. A doubt was entertained as to the jurisdiction of this new court to entertain points which arose upon the face of the record, and the case was postponed until that preliminary point was settled. At the next sitting of the Court of Appeal, Lord Chief Justice Denman presided, and the court being composed of different members, it declined to give judgment upon the case; and, on the other hand, it was a matter of some doubt whether the court having been dissolved before which the case was originally set down for hearing, any further

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

REG.  
v.  
HARRIS.  
—  
*Practice—  
Admitting pri-  
soner to bail.*

steps could be taken. In the meantime the prisoner remained in custody, and it was under these circumstances that application was now made to admit him to bail until the case was decided.

*W. H. Cooke* (on the part of the prosecution), resisted the application, and said that Baron Platt had expressed a strong opinion against the prisoner on the merits of the case, and in fact there was no hardship inflicted on the latter.

*Huddleston* (in reply), admitted that the learned judge who tried the case had formed an opinion adverse to the prisoner on the facts; but, supposing the prisoner to have been convicted on an informal indictment, it was a hardship upon him to be imprisoned when the result might be that he was improperly convicted. Moreover, he should be able to show by affidavit that the prisoner's health was injured by the imprisonment.

ERLE, J.—If I had not heard that my brother Platt had expressed an opinion on the case, I should have felt it to be my duty to communicate with him, and ascertain his view as to the probable ultimate result; for, if the probability be that the conviction may be sustained, then I should not consider the prisoner entitled to be bailed; but if there was a probability that the ultimate result would be in the prisoner's favour, then it would be proper to admit him to bail. Under no circumstances should I bail a prisoner in such a case as the present without communicating with the learned judge before whom he was tried. Here, however, the opinion of Baron Platt is admitted to be against the prisoner on the merits, and therefore, without troubling him, I must refuse the application. Baron Platt may be applied to at any time to admit the prisoner to bail, if he thinks fit in his discretion to do so. No real hardship is inflicted on the prisoner, for he has been tried and convicted by a jury, and, in the opinion of the judge, properly so convicted.

*Application refused.*

## OXFORD CIRCUIT.

## GLOUCESTER SUMMER ASSIZES.

*August 8, 1849.*

(Before Mr. Justice ERLE.)

REG. v. BAYLIS. (a)

*Practice—Detention of prisoner in custody until an infant witness be instructed in the obligation of an oath.**Where a bill for rape on a child under the age of ten years has been ignored by the Grand Jury, in consequence of the judge refusing to allow the child to be sworn as a witness, on the ground of its want of knowledge of the obligation of an oath, the prisoner was ordered to be detained in custody until the child could be properly instructed.*

A BILL was preferred against the prisoner for a rape on Mary Ann Ballinger, a child under the age of ten years. The child was brought before Mr. Justice Erle to be examined, previously to going before the Grand Jury, as to her knowledge of the obligation of an oath. The learned judge intimated that the child did not appear to him to have any notion whatever of religious or moral duties, and, consequently, that she was unfit to have an oath administered to her.

The bill was consequently ignored by the Grand Jury.

Gray, for the prosecution, applied that the prisoner should be remanded until the next assizes, in order that the child might be instructed in the obligation of an oath.

In an *Anonymous case* before Mr. Justice Rooke, at this city (Gloucester), where a criminal prosecution was coming on to be tried, and the learned judge found that the principal witness was a female infant wholly incompetent to take an oath, he postponed the trial till the following assizes, and ordered the child to be instructed in the meantime, by a clergyman, in the principles of her duty, and the nature and obligation of an oath; and at the next assizes the prisoner was put upon his trial, and the infant, being found by the court, on examination, to have a proper sense of the nature of an oath, was sworn; and the prisoner was convicted upon her testimony and executed. (Russ. on Crimes by Greaves, vol. 1, p. 695.)

It appeared that, upon a conference with the other judges on Mr. Justice Rooke's return from the circuit, they unanimously

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

REG.  
v.  
BAYLIS.

approved of what he had done. (*Ibid*, referring to a note in *White's case*, 1 Leach. 430, and 2 Bac. Abr. 577, in *notis*.)

Upon the authority of this case,

ERLE, J., directed that the prisoner should be detained in custody until the next assizes, the child in the meantime to be duly instructed.

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COMMISSION OF OYER AND TERMINER AND  
GENERAL GAOL DELIVERY FOR THE COUNTY  
OF THE CITY OF DUBLIN.

JANUARY SESSION, 1849.

(Before PERRIN, J., and RICHARDS, B.)

*January 13 and 18.*

REG. v. CHARLES GAVAN DUFFY. (a)

*Practice—Felony—Indictment—Demurrer to—Form of judgment—  
Respondeat ouster.*

*A prisoner indicted for felony under the stat. 12 Vict. c. 12, may, after demurring to the indictment, if his demurrer be overruled, plead over to the felony.*

THE prisoner, who had on a former day been indicted in several counts under the statute 12 Vict. c. 12, for compassing to deprive and depose Her Majesty from the style, honour, and royal name of the imperial crown of the United Kingdom, and with compassing to levy war against Her Majesty, having demurred to the indictment, the demurrer was argued at great length. The court (Perrin, J., and Richards, B.) having pronounced their opinion to be that the demurrer must be overruled as to the first and second counts of the indictments, but that as to the other counts, it ought to be allowed as to all the overt acts laid in them except the first, the Attorney-General thereupon, on behalf of the crown, prayed final judgment upon the demurrer. For the prisoner it was insisted that he was now entitled to plead over, and that the proper judgment upon the demurrer was *respondeat ouster*, and not final judgment; upon which, it was ordered by the court that the question as to the proper judgment to be pronounced, which had been adverted to during the argument of the demurrer, should be formally argued at each side, and accordingly the argument was (January 13th) opened by

*Hatchell* (Solicitor-General) for the crown.—The decision of the court upon the general demurrer taken by the prisoner to the

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

indictment being against the prisoner—looking at present to the first count—is conclusive against the prisoner, and the crown is entitled to the final judgment of the court, and to have such sentence passed upon the prisoner as the court shall think proper to pronounce, just as if he was convicted by the verdict of a jury. I think it must be taken for granted, and that I am justified in assuming that, in taking a general demurrer to the indictment, the prisoner admits the charges it contains, as, according to all the rules of civil and criminal pleading, the facts must be admitted in order to raise the question on which the prisoner seeks to obtain the judgment of the court. In raising the demurrer, the prisoner must have admitted the charge in the indictment of having compassed to depose the Queen, and having expressed that compassing by the printings set out in the indictment; but, in point of law, he denied having committed any felony, or was guilty of any offence, and upon that he asked the judgment of the court in his favour. On the part of the crown, I submit that the prisoner, having admitted the facts by his general demurrer, and the judgment of the court being against him upon the question of law, nothing remains but to call him up for judgment and sentence him accordingly: (2 Hale, P. C., c. 33, 257.) First, I submit that, even in capital cases, the prisoner, after a demurrer to the indictment has been ruled against him, is not entitled to plead over; and, secondly, even if in *favorem vitæ* he is entitled to plead over, this is not that case, “The true difference,” says Hale, “seems to be this: If a person be indicted or appealed of felony, and he will demur to the appeal or indictment, and it be judged against him, he shall have judgment to be hanged, for it is a confession of the indictment, and a wilful confession.” He then cites the high authority of Lord Coke to bear him out in that construction of the law, “If a party demur in law, and that be adjudged against him, he shall have judgment to be hanged:” (2 Coke’s Inst. 178.) There is also another passage in Hale (vol. 2, p. 257), to the effect that if the prisoner pleads in bar, and concludes, as he ought, to the felony, and the Attorney-General demur and have judgment for the crown, the prisoner may then be put to trial, because the Attorney-General’s demurrer is no confession of the offence. Serjeant Hawkins, in 2 Pleas of the Crown, c. 31, sect. 7, says, “that in criminal cases, not capital, if the defendant demur to an indictment, &c., whether in abatement or otherwise, the court will not give judgment against him to answer over, but final judgment.” The object of the law clearly is, that the life of a party shall not be endangered by mispleading, but when the reason ceases, of course there is no ground for the law; and when it was sought, in *R. v. Taylor* (3 B. & C. 509), to extend this principle to cases of misdemeanor, the court, entertaining some doubt whether they ought to pronounce final judgment for the crown or judgment of *respondeat ouster*, directed the point to be argued, and Lord Tenterden, in pronouncing the decision of the court, held, that the judgment against the prisoner ought to be final. It is

REG.  
v.  
DUFFY.

Demurrer—  
*Respondeat*  
*ouster.*

Argument of  
the Solicitor-  
General for the  
crown.

REG.  
v.  
DUFFY.  
—  
Demurrer—  
Respondent—  
ouster.

Argument of  
the Solicitor-  
General for the  
Crown.

clear that Lord Tenterden, in his judgment, was speaking of felonies at common law on conviction for which death would follow. There have been two or three cases, in 1841 and 1842, which will probably be referred to at the other side: they contain the *dicta* of three different judges on circuit. The first is the case of *The Queen v. Phelps* (Car. & Marsh. 180.) It was an indictment for murder, and Mr. Graves, as counsel for the prisoner, proposed to put in a demurrer to it, and also a plea of not guilty. Alexander, for the prosecution, objected to this course, and Mr. Justice Coltman said, that in his opinion, the prisoner might demur and plead over to the felony at the same time; at all events he was clearly of opinion that the prisoner might demur, and if the demurrer were ruled against him, then plead over to the felony; but that *dictum* does not rule the present case, for it was a capital felony. In *The Queen v. Adams* (Car. & Marsh. 299), which was also tried before Mr. Justice Coltman, in the year 1842, the prisoner was indicted for riotously assembling and demolishing a house, which was previously a capital felony, and the judge intimated his opinion to be, that the prisoner might demur to the indictment and afterwards plead over to the felony. In *The Queen v. Purchase* (Car. & Marsh. 617), where a similar question arose, the prisoner was indicted for a transportable felony; his counsel observed that some doubt might exist whether the prisoner might plead over to the felony if the demurrer were ruled against him, to which Mr. Justice Patteson replied, "I think that there is no doubt that the prisoner may plead over." Subsequent cases, however, have overruled these *dicta* in Carrington & Marshman's Reports, which were improvident and ought not to be acted upon. In the case of *The Queen v. Odgers* (2 M. & Rob. 479), which occurred in 1843, and was an indictment for cutting and wounding, the prisoner pleaded not guilty, and afterwards his counsel proceeded to take an objection which could only be taken by demurrer. Cresswell, J., said, "It is admitted that the only mode of the prisoner taking advantage of the objection would be by demurrer, and it is said that in felonies he might demur and plead over at the same time. I am decidedly of opinion that the prisoner has no such right, and Mr. Justice Patteson and myself, after consultation, on the Oxford circuit, agreed that it ought not to be allowed. If a prisoner demurs, he must abide the consequences." In *Reg. v. Bowen* (1 Car. & Kir. 501), decided in 1844, the prisoner's counsel having proposed to demur to the indictment which was for the destruction of a registry of baptism, Tindal, C. J., said, "This is not a capital case; you may therefore be bound by your demurrer, and may not be allowed to plead over. It is a very doubtful point—I give no judgment—I only forewarn the counsel that they may be concluded by the demurrer." In consequence of this opinion by the chief justice, who was, besides his eminence as a judge, remarkable for his caution in not suggesting any opinion in which the law did not warrant him, the prisoner's counsel did not persevere in putting in the demurrer. If we go back to the fountain head, where the subject is to be found in its

primitive purity, it will be seen that the proposition contended for on behalf of the crown is well founded, namely, that even in a capital case a prisoner is bound by a demurrer.

*Napier*, Q.C., and *Butt*, Q.C., for the prisoner.—The court is called on by the counsel for the crown to make a startling decision, and one which must be prejudicial to the fair administration of justice. If a prisoner has counsel to assist him in matters of law, it is his duty to see that he is not, by the frame of the indictment, embarrassed in pleading to it; and if he considers the frame of the indictment likely to embarrass the prisoner, he is warranted in submitting the question to the consideration of the court; but can it be contended that he does so at the peril of the prisoner, and that he shall be liable to transportation for an error of his counsel? The difficulty cannot be got rid of by endeavouring to establish a distinction between capital and other cases. In 2 Hale P. C. 225, it is laid down that, if it be but an extra-judicial confession, though it be in court, as where the prisoner freely tells the fact and demands the opinion of the court whether it be felony, though upon the fact thus shown it appear to be felony, the court will not record his confession, but will admit him to plead to the felony “not guilty.” The confession of the fact is not as an admission of guilt, but for a judicial purpose, to try whether the indictment charges the felony well or not. In 4 Bl. Com. 334, it is said “some have held that if, on demurrer, the point of law be adjudged against the prisoner, he shall have judgment and execution,” &c. But this is denied by others who hold that in such case he shall be directed and received to plead the general issue not guilty after a demurrer determined against him.” The authorities upon this question are to be found in Gabb. Cr. L. 325-6. As regards the question at issue, there is no distinction between general and other demurrers. The crown relies upon an authority based upon a case in one of the Year Books, but, as Chief Justice Gibbs said, you might find a case in the Year Books for anything. If a man refused to put himself on the country *pro bono* and *malo*, and rested on his plea, refusing to submit his case to any mode of trial, he might be hanged, but that is not the present case. What difference, in reason and common sense, is there between a man putting in to the indictment a bad plea, confessing the offence, and putting in a demurrer to the indictment? As to rules which have been made in *favorem vitæ*, *Gray’s case* (11 CL & Fin. 482) establishes the proposition that where there is a privilege in *favorem vitæ* given to felony, it is not taken away by the punishment being reduced from capital punishment to transportation: since that case the distinction between capital and other felonies as regards the privileges of the accused is abolished. There is certainly some obscurity concerning the ancient doctrine as laid down in the old books:—“If a man indicted of felony demur to the indictment, and will not otherwise answer, this is no standing mute, but if the demurrer be ruled against him, he shall have judgment of death” (2 Hale P. C. 315); but that is only

REG.  
v.  
DUFFY.

Demurrer—  
Respondent  
oustes.

Argument of  
Napier and  
Butt for the  
prisoner.



REG.  
v.  
DUFFY.

Demurrer—  
Respondent  
ouster.

Argument of  
Napier and  
Butt for the  
prisoner.

because he refuses to answer, and will not put himself on the country. The obscurity may be cleared up by considering that when a party demurred he could not be considered as mute, and the punishment of *peine forte et dure* could not be applied, which was only to compel a party to plead—if, then, in such case, the party would not put himself on the country, the judgment was final, not because he demurred, but because he rested on his demurrer, and would not go to trial at all. In the Year Book, 14 Edw. 4, p. 7, plac. 10, the words are *s'il demur sur un plea*, that is, if he rest on the plea, and does not put himself on the country: (1 Dyer, 39, b. plac. 65; *Hume v. Ogle*, Cro. Eliz. 196; *Wilson v. Law*, 1 Lord Raym. 20.) As to the cases cited from Carrington & Marshman, the dictum of Patteson, J., is clearly in our favour; and *Reg. v. Bowen* (Car. & Kirw. 503,) was tried before the decision of the House of Lords in *Gray's case* had been pronounced. In *The Queen v. Houston* (Jebb & B. 103), Mr. Justice Burton said, "this being an indictment for misdemeanor, and *not for felony*, the prisoner is not, upon the demurrer taken by him being overruled, entitled to plead over;" and even in misdemeanor there was recently a case in which the party demurred with liberty to plead over: (*The Queen v. The Birmingham and Gloucester Railway Company*, 3 Q. B. Rep. 224, and S. C. 1 G. & Dav. 459.) The 11 & 12 Vict. c. 12, under which the indictment in this case is framed, plainly contemplates a conviction by verdict; the 4th and 7th sections relate only to convictions in open court, but a demurrer cannot be considered such. In Rastall's Entries (p. 584), after a plea of sanctuary, the prisoner was told that if he wished he might plead over: he did so, and was acquitted. Bacon states (Abr. tit. "Demurrer,") that the judgment in demurrer is *respondeat ouster*. A demurrer to an indictment is the same as a plea in abatement: (2 Hale P. C. 236.) There is no distinction in cases of appeal: (Com. Dig. tit. "Appeal.") A demurrer can only be said to confess the facts because it does not deny them, for it does not in express terms admit them. It is only an implied admission of what is well pleaded, but here the prisoner says nothing is well pleaded: (2 Hale P. C. c. 29, p. 225.) It is plain from Hale that there was a form whereby the prisoner could, before pleading, ask for the judgment of the court, whether the indictment was sufficient; where a man rested his case entirely on the question raised as to the indictment, and refused to plead, then final judgment should be given against him; and in mentioning the opinion of Choke, J., Hawkins merely referred to it as an authority to that effect. Cresswell, J., in *The Queen v. Odgers* (2 Moo. & Rob. 479), abided, as I contend, by the opinion he had expressed in the former case. The point raised in *Reg. v. Odgers* was, whether a man could plead and demur together, but there is no doubt that he might demur in the first instance, and afterwards plead "not guilty."

*The Attorney General (Monahan)* in reply.—The court is bound, I submit, to pronounce final judgment in this case. I think that it is a matter of law. I admit that it is matter of discretion with

the court to allow a demurrer to be withdrawn, but what I am now contending for as a matter of law is the form of the judgment on the demurrer. In misdemeanor it cannot be doubted that the proper judgment would be final judgment, and not *respondeat ouster*: (*R. v. Gibson*, 8 East, 110.) It is worthy of notice that the court decided the matter on a plea of misnomer. It was argued at very considerable length, and the judgment being against the party—upon a plea which did not go at all to the merits of the case—still the court held that the judgment was final: (*R. v. Taylor*, 3 B. & C. 502.) I refer to these cases to show the ground and reasons on which they were decided, and it will appear that the same rule will apply to cases of felony. It appeared, in *R. v. Taylor*, on an inspection of the plea of *autrefois* acquit, that the offences charged were not the same. The court ordered final judgment to be entered. It is a very strong case for the prayer of judgment by the plaintiff that the defendant might be ordered to plead over; but the court thought that it was their duty, notwithstanding the prayer, to give that judgment which was right, and that the man should have final judgment. I understand the meaning of a demurrer to be that a party puts himself on trial by the court. *Gavan v. Hussee* does not apply, for the demurrer was allowed, and the question in the present case did not arise. The case in 1 Salk. 59 (*Wilson v. Law*), is not a demurrer to the insufficiency of the declaration, but to the sufficiency of the process. *Hume v. Ogle* (Cro. Eliz. 196,) does not bear out the argument of the prisoner's counsel. The case of *Gray v. The Queen* does not go so far as has been stated; it only decided that in felonies, the punishment of which had been capital, the prisoner retains his right of peremptory challenge though the punishment be no longer capital, but it does not decide, as has been contended, that privileges which have been granted in *favorem vite* are to be extended to all felonies. Great mischief will result if the law turn out to be this, that a party may demur and then take his chance of a trial, and, instead of by the country; and the case referred to by Hale, in 2 P. C. 315, reported in the Year Book, 14 Edw. 4, was a case where a party put in an imperfect plea. If an indictment is insufficient, the prisoner can move to quash it, but that is different from the course taken here. Hawk. book ii. c. 23, s. 137, has been relied on, but there is a distinction between appeals and indictments. An appeal was not at the suit of the crown, and was allowed to be heard after an indictment. One of the most recent cases is *Ashford v. Thornton* (1 B. & Ald. 404; 2 Hawk. c. 31, s. 5, edit. of 1824; Stanford, lib. 3, p. 150; 3 Lord Raym. 70,) where the pleadings in *Wilson v. Law* are set out; several of the authorities referred to as adjudged cases are not cases adjudged on the question at all. It is perfectly plain that the case in *Dyer* (*Gavan v. Hussee*), cannot be said to be a decision on the point, for the demurrer was allowed. I do not deny that if a proper case is made for it, the court has the discretion to expunge a demurrer from the record altogether, and giving no judgment upon it, permit the party to plead upon his original arraignment. But the

REG.  
v.  
DUFFY.  
—  
Demurrer—  
Respondeat  
ouster.

The Attorney-  
General in  
reply.

REG.  
v.  
DUFFY.  
—  
*Demurrer—  
Respondent  
ouster.*

present case is not, I submit, a discretionary one at all: the prisoner has chosen to take the opinion of the court. I therefore respectfully call for the judgment of the court, the only judgment that can properly be made the subject-matter of further consideration, or be received by a Court of Appeal. I believe the case is now to be decided, for the first time, on principle, and on principle and on the weight of authority in criminal as well as civil cases, I submit that a demurrer carries with it an admission of the facts on the record, and, therefore, that the judgment ought to be final.

*Cur. adv. vult.*

*January 18.—JUDGMENT.*

PERRIN, J.—The court has already pronounced judgment upon the demurrer in this case. The effect of that was the overruling the demurrer to the first and third counts, and allowing the demurrer to all the overt acts in the other counts except the first, of course specifying those acts. Upon this the Crown prayed final judgment, and the prisoner insisted that he was entitled to plead over to the indictment. Several cases have been cited upon both sides: we have looked into all of them, and my Brother Richards has mentioned a case which was not mentioned in argument, the latest case on the subject, and not only the latest, but one which occurred in 1845—and since the question was under the consideration of the English judges concerning felonies as in *Gray's case*—namely, the case of *The Queen v. Serva* (2 Car. & Kir. 53.) In that case a demurrer was put in and overruled, after which the prisoners were permitted to plead over to the felony, and they pleaded “not guilty.” We consider it right to follow that case, and pursuing the precedent to which we have been referred by Mr. Butt in *Rastall*, after pronouncing our judgment upon the demurrer, at the desire of the prisoner we shall allow him to plead over to the felony; and now, Clerk of the Crown, ask him whether he is guilty or not guilty?

The prisoner having been called on to plead, pleaded “not guilty,” and the court was adjourned to the 6th February.

## COURT OF CRIMINAL APPEAL.

November 7, 1849.

(Before WILDE, C. J., POLLOCK, C. B., ROLFE, B., COLERIDGE, J., CRESSWELL, J., and PLATT, B.)

REG. v. MARIA MANNING. (a)

*Trial by a jury de medietate linguæ, 7 & 8 Vict. c. 66, s. 16.**An alien female, married to a natural-born subject, becomes, by the 7 & 8 Vict. c. 66, herself a British subject, to all intents and purposes, and therefore, on an indictment for murder against her, she is not entitled to be tried by a jury de medietate linguæ.*

THE prisoner was indicted with her husband for wilful murder. Before plea, application was made on her behalf, that a jury *de medietate linguæ* might be empanelled to try her, on the ground that she was an alien.

It was objected by the *Attorney-General*, and ruled by the court (POLLOCK, C. B., MAULE, J., and CRESSWELL, J.), that no such application could be made, until the prisoner had pleaded. On a plea of not guilty being recorded, the application was renewed, but on it being stated by counsel for the prosecution, and not denied by the other side, that she was married to a natural-born subject, after a discussion, the court decided against the claim. Upon this decision, a suggestion of the claim, and the grounds of it, was entered on the record, to which the *Attorney-General*, on behalf of the crown, pleaded (in person) that she was married to a natural-born subject. Her counsel demurred to this plea, and there was a joinder in demurrer. (b)

The trial then proceeded, an English jury being empanelled, and the prisoners were both convicted.

The judges now met to deliberate upon the following case, submitted to them by the court below:—

At the last session of the Central Criminal Court, Frederick George Manning, and Maria his wife, were jointly indicted for the murder of Patrick O'Connor. Both prisoners pleaded "not guilty," but the female prisoner claimed a jury *de medietate linguæ*. She was born at Lausanne, in Switzerland, and in the year 1847 was married to the male prisoner, a natural-born subject of this realm. The prisoner's counsel referred to stat. 28 Edw. 3,

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

(b) The objection thus being raised on the face of the record, would of course have been the subject of a writ of error, but the point appearing to be clear, and the judges who presided at the trial being unanimous in their judgment, the *Attorney-General* thought it right to refuse his fiat for the issuing of the Writ of Error, at least until the opinion of the judges forming the Court of Appeal, should be obtained

REG.  
v.  
MANNING.  
—  
Practice—  
Jury—  
Foreigner.

c. 13, and 6 Geo. 4, c. 50, s. 47. The Attorney-General for the prosecution relied upon the stat. 7 & 8 Vict. c. 66, s. 15, and of *Barre's case* (Moore, 557.) The judges—the Lord Chief Baron, Mr. Justice Maule, and Mr. Justice Cresswell, decided that the prisoner was not entitled to a jury *de medietate linguæ*, and the trial of both prisoners proceeded in the ordinary course, and both were convicted.

The question is, was the female prisoner entitled to a jury *de medietate linguæ*?

*Ballantine* (with whom was *Parry*) for the prisoner.—The claim of the prisoner to be tried by a jury *de medietate linguæ*, is founded on the stat. 28 Edw. 3, c. 13, s. 2, which says, “And that in all manner of inquests and proofs which be to be taken or made amongst aliens and denizens, be they merchants or other, as well before the mayor of the staple, as before any other justices or ministers, although the King be party, the one-half of the inquests or proofs shall be denizens, and the other half of aliens, if so many aliens and foreigners be in the town or place where such inquest or proof is to be taken, that be not parties, nor with the parties, in contrary pleas or other quarrels, whereof such inquests or proofs ought to be taken.” This subject is referred to by the 47th section of the 6 Geo. 4, c. 50, which seems to be merely declaratory of the former act. It says, “Nothing herein contained shall extend, or be construed to extend, to deprive any alien indicted or impeached of any felony or misdemeanor, of the right of being tried by a jury *de medietate linguæ*, but that on the prayer of every alien so indicted or impeached, the sheriff, or other proper minister, shall, by command of the court, return for one-half of the jury a competent number of aliens, if so many there be in the town or place where the trial is had,” &c. It is clear, therefore, that the prisoner would have been entitled to a jury *de medietate linguæ*, before the late stat. 7 & 8 Vict. c. 66, and the question is, whether that statute takes away her privilege, she having been at the time of the trial married to a British subject. The 16th section is as follows:—“That any woman married, or who shall be married to a natural-born subject, or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject.” The spirit of that act is to confer privileges, and not to take them away, but by the construction contended for by the prosecution, this prisoner possessed, at the time of her marriage, and for some time afterwards, of the right she now claims, is, without any act of her own, and without any reason why the privilege should not be as valuable to her as ever, to be deprived of it by mere implication. The jury system, as a mode of trial, is a part of the constitution of this country, and cannot be altered or destroyed without express words in a statute. But the term “jury” is never once used in the statute in question, and it is not an unfair inference, therefore, that the Legislature never intended to effect so important an alteration. The stat. Edw. 3, c. 28, is construed by Chitty, in his Criminal

Ballantine for  
the prisoner.

Law, p. 525, to extend the right to denizens as well as to aliens. Probably at that time there could be no great difference between them as far as this question is concerned, for the object was to give to all persons who had been born abroad, under another allegiance, and speaking another language,—the advantage of having some men upon the jury who could fully understand that which they might wish to convey. It is true the subsequent statute does not mention denizens, but that does not affect the question here.

WILDE, C. J.—Does Chitty refer to any authority for saying that the act of Edw. 3, refers to denizens as well as to aliens?

Ballantine.—No. It is the construction he puts upon the act. From the circumstance that no means of trying the fact of alienage exist, or are in any of the authorities suggested, it would seem that the mere claim, on the part of the prisoner, is sufficient to give him the right to a jury *de medietate linguæ*, and this appears to be supported by Lord Hale, in the 2nd vol. of Pleas of the Crown. He says, "If upon an indictment of felony against an alien, *he allege that he is an alien*, he may challenge the array," &c. Probably it would be taken for granted that an English subject would never seek to be tried by foreigners. The 47th section of the 6 Geo. 4, c. 50, says, "on the prayer of the alien," but says nothing respecting the proof of alienage. The Attorney-General stated in the court below, that if he acceded to the demand of a jury *de medietate linguæ*, and on the construction of the statute it turned out that she was not entitled to it, there would have been a mis-trial; but surely a prisoner, who had been, at her own request, tried by a jury *de medietate linguæ*, would be estopped from afterwards contending that she had no right to what she had asked for. It was further contended, on the trial below, that without reference to the late statute, the prisoner would be deprived of her right, by reason of her being jointly indicted with a natural-born subject; and *Barre's case* (Moore, 557, and 4 Bac. Abr. 565), was cited: there it is said that, upon an information exhibited by the Attorney-General against several merchants, some of whom were aliens, and some English, after issue joined, the aliens prayed a trial *per medietate linguæ*, but it was resolved by all the judges that they should not have it, and they likened it to the case of privilege, where one of several defendants demands privilege, and the court, as to his companions, cannot hold plea: then he shall be ousted of his privilege. It is difficult to understand that case in the short note we have of it, for there seems no reason why separate trials should not be had, and then every difficulty would be obviated. Surely it cannot be contended that the stat. of Edw. 3, could be annulled by merely joining a natural-born subject with a foreigner in an indictment. It would at least be giving to the crown, or a prosecutor, a power quite inconsistent with the spirit of our constitution. There might have been some peculiarities in *Barre's case* of which we are uninformed, but it cannot be contended here, that any difficulty was in the way of trying these two prisoners separately. But the main question is, as to the effect of the 7 & 8 Vict.

REG.  
v.  
MANNING.  
—  
Practice—  
Jury—  
Foreigner.

Ballantine for  
the prisoner.

REG.  
v.  
MANNING.  
—  
Practice—  
Jury—  
Foreigner.

c. 66. In putting a construction upon the words, "all the rights and privileges," in the 16th section, the 6th section may help us: it declares that aliens may obtain a certificate from the Secretary of State, giving them the privileges of natural-born subjects, with certain exceptions mentioned in the act, and such others as may be mentioned in the certificate. Suppose, then, an alien female marries a foreigner who has been naturalized, she would, for certain purposes, be naturalized also, but not for all purposes.

WILDE, C. J.—Name what privilege would be denied to her?

Ballantine.—All such as by the certificate were denied to her husband. If her marriage with him gives her certain rights, it cannot extend them beyond those of the husband himself. This puts a limitation upon the 16th section, and shows that the privileges conferred are not absolutely those of a British-born subject. But whatever may be the amount or the nature of the privilege conferred, it is clear throughout the act that there is no mention of any disqualification—of any abrogation of rights that existed before. There was much expense and trouble formerly in obtaining naturalization, and these difficulties are sought to be removed. The preamble of the act clearly shows that the object was to extend, and not to restrain, the former rights of aliens. Assume, even, that she had all the rights of a natural-born subject, that is quite consistent with her right to be tried by a jury *de medietate linguæ*, which might be just as necessary for her protection when married as when unmarried. A fair construction is thus given to the statute, and an important privilege remains, as it was probably intended to be, untouched.

The Attorney-  
General for the  
crown.

The Attorney-General (with whom were Clarkson, Bodkin, and Clerk) for the prosecution.—1st. It would have been clearly a mis-trial if I had acceded to the demand for a jury *de medietate linguæ*, and the prisoner was afterwards held not to have been entitled to it, for it would have appeared on the record that she was an alien born, but had afterwards married an English subject, and the award of a jury *de medietate linguæ* would therefore have been erroneous. As to *Barre's case*, there is a reason given for the decision, in Moore, 557, which is not mentioned in Bacon's Abridgment; there it is said, "for the English, who are defendants, cannot have that trial, but the foreigners may have a trial by all English." It is assimilated to the plea of privilege, and, generally speaking, the analogy would hold good, although that would not be the case where a peer was indicted with a commoner: there the plea of privilege must be allowed, and that because they could not be tried together; the commoner could not be tried by the peers, nor the peer by commoners, but in *Barre's case* it was otherwise; there the defendants might have been tried together by an English jury, but not by one composed of half foreigners; and the court held that the claims of the aliens to a jury *de medietate linguæ* was invalid. The stat. 27 Edw. 3, c. 8, may serve to show the meaning of the statute passed in the next year—upon which the prisoner relies. It enacts, "that upon all complaints before the mayor of the

staple, and upon which an inquest should be awarded, if both parties were strangers, it should be tried by strangers; if both denizens, it should be tried by denizens; if one a denizen, and the other an alien, one moiety of the inquest should be denizens, and the other aliens." This statute did not apply where the King was a party, but the 28 Edw. 3, applies as well to criminal as civil cases. A mistake is made in classing denizens and aliens together; on the contrary, it is obvious from the wording of the statute, that "denizen" is used in contradistinction from "alien," and means those who have the position of British subjects, whether by birth or by patent. Brooke's Abr. tit. "Denizen" and "Alien" confirms this view, and it is material to observe that the word which, in the 28 Edw. 3, is translated "*amongst*," is in fact "*entre*," which strictly means between, and this explains the passage in Chitty, referred to on the other side. The statute then applies to suits "*between*" aliens and denizens, but not to those in which either plaintiffs or defendants are of a mixed character, for then the inconveniences pointed out in *Barre's case* would arise. [POLLOCK, C. B.—Is not the 28 Edw. 3, repealed by the Jury Act, 6 Geo. 4, c. 50?] It is in fact repealed by the 62nd section, but the provisions are re-enacted by the 47th section. A jury *de medietate lingue* has been treated as though the foreigners, which formed part of it, were to be taken from the country of the prisoner on trial; but a Frenchman might be well tried by a jury of half Russians, the latter not understanding, perhaps, a word of his language, and the principle, therefore, of the privilege has been entirely misconceived. The right which was conferred by statute may be withdrawn by statute. It is true the statute of Vict. does not mention juries, but it just as effectually takes away the right, if it changes the *status* to which alone it was attached. Aliens are entitled to the privilege. Is this prisoner an alien? The statute in question declares that if she marries a natural-born subject she is naturalized *ipso facto*. She was so married at the time of the trial, and had ceased therefore to be an alien. It is said that the naturalization is not absolute; but the words of the statute are as extensive as they can be, with regard to the woman; there is no limitation. It is true that in the 15th section there is a reservation of all *rights of property*, which in the case of the man might have been otherwise restricted by the certificate; but even then there is no mention of personal rights, which is a clear proof that they were intentionally excluded. Can it be said, then, that a naturalized person is an alien? In Com. Dig., tit. "Alien" (B.), under the heading, "Who is not an alien?" it is said "a person naturalized." So, in Co. Litt. 129 a, it is said, "If an alien be naturalized, he shall be to all intents as a natural subject." It is said that a prisoner is entitled to a jury *de medietate lingue*, on mere allegation of alienage and demand, and that the prosecution cannot deny the alienage. [POLLOCK, C. B.—We think you need not trouble yourself on that point. PLATT, B.—If your position is correct, that naturalization places an alien in the precise position of a natural-born

REG.  
v.  
MANNING.  
—  
Practice—  
Jury—  
Prisoner.

The Attorney-  
General for the  
crown.



REG.  
v.  
MANNING.  
—  
Practice—  
Jury—  
Prisoner.

subject, why are the words "and have all the rights and privileges of a natural-born subject" added? CRESSWELL, J.—It may have been to prevent any contention as to her having no other rights than those of her husband.] Or from more abundant caution. Expletives are often so used in acts of Parliament, as "plunder or steal," "dispose of, utter, and put off," &c.

*Ballantine* replied.

Judgment.

WILDE, C. J., delivered the judgment of the court.—From the time this case came from the Central Criminal Court into the hands of the judges, it has received their anxious attention, in order that they might be better prepared to appreciate the arguments that would be addressed to them. We have attentively listened to those arguments, so very ably urged upon us by Mr. Ballantine, and are unanimously of opinion that the objection cannot be sustained, and that the prisoner was properly tried by the jury impanelled at the trial. It appears to all the judges, that for the purpose of arriving at a just conclusion upon this case, it is quite unnecessary to allude to many of the topics introduced in the course of the argument. The question is simply this, was the prisoner, Maria Manning, an alien or not at the time of this trial? If she was, she would be entitled to that which she prayed, namely, a jury *de medietate linguæ*. If she was a British subject, she was not so entitled. Now the effect of a Bill of Naturalization has not been questioned, and scarcely is it to be expected that it should be. The authority of the text-writers is so clear, that no one can question it. In Hale, in Coke, in Blackstone, it is laid down, that a person naturalized becomes, to all intents and purposes, as a British-born subject. In Naturalization Acts of Parliament, certain qualifications were introduced, because it was competent for the Legislature to impose qualifications on individuals as British subjects, which did not apply to other subjects of the country. The Royal Marriage Acts are instances; and various other statutes, disqualifying subjects in particular situations from holding certain offices, and exercising certain rights. The question in this case, therefore, seems to be, what was the *status* or civil or political character belonging to the prisoner at the time of the trial? The section of the act so much relied on in the arguments, stated that the party should be taken and deemed to be naturalized. What, then, is the *status*, what are the political rights and character of a person naturalized? In *R. v. De Mierre* (5 Burr, 2787), the question was, whether a Naturalization Bill disqualified the person who was the subject of it for performing the office of constable. It appeared clear that the naturalization had given him the *status* of a British subject, but by virtue of a special provision in the particular act, disqualifying him from holding any office of trust, he was held incapacitated to perform the office of constable, which was held to be one of trust. Any British subject may be put under certain disqualifications, but I know of no instance in which the character of a British subject and of an alien are united. Where such disqualification exists, it is not the result of alienage.

If the effect, therefore, of naturalization is to make the party, to all intents and purposes, a British subject (as is proved by the authorities to which I have referred, as well as by the very learned judgment in 1 Ventr. 420, in which the whole matter was gone into), is there anything in this act of Parliament which qualifies the statement that a person situated as this prisoner is, shall be naturalized? The argument is, that the object of this statute was to give certain rights, but not to take any away; but that might be urged in every case of a Naturalization Bill, because in none of them is it even said that the trial by jury is to be affected. What does naturalization give? All that belongs to the character of a British subject. What does it take away? All that does not appertain to that character. It makes the party *ipso facto* a British subject, to all intents and purposes. The arguments attempted to be drawn from the other parts of the act of Parliament appear to be, that a woman married to a husband naturalized in a particular way might, by the construction contended for on the part of the crown, acquire a different *status*, and be entitled to rights beyond those which her husband possessed. Very likely she might. If the husband had been naturalized, subject to certain disqualifications, applied to him by legislative authority, he would not the less be a British subject because he was under those disqualifications. But they could not be taken to qualify a distinct substantive enactment, that the wife should be naturalized without regard to any such qualifications. It is asked why the words "all the rights and privileges of a natural-born subject," are added, if the word "natural" itself imports them; but we surely cannot take words intended to enlarge the operation of an act, and argue that they are elsewhere used with the intention of restriction. They were doubtless introduced in pursuance of the general practice, and were the ordinary phraseology which belonged to legislative grants. I find no words, from the beginning to the end of this act, which would at all warrant the conclusion, that it was intended to operate by enlarging or limiting whatever belonged to the *status* of a British subject. Being then a British subject, she could not be an alien, and was not therefore entitled to be tried by a jury *de medietate linguæ*. We are all of opinion that the objection must be overruled.

The *Attorney-General*, *Clarkson*, *Bodkin*, and *Clerk*, for the prosecution.

*Serjt. Wilkins*, *Charnock* and *Saunders*, appeared at the trial for *Frederick Manning*.

*Ballantine* and *Parry*, for *Maria Manning*.

REG.  
v.  
MANNING.  
Practice—  
Jury—  
Prisoner.

## COURT OF CRIMINAL APPEAL.

REG. v. TOSHACK. (a)

November 28, 1849. (b)

*Forgery at common law.*

*An indictment recited that the Corporation of the Trinity House were in the habit of examining persons voluntarily submitting to such examination, touching their nautical skill, and granting them certificates to act as masters; and that in order to enable persons to be examined and procure such certificates, it was necessary to produce to the examiners certificates of service, sobriety, and good conduct at sea, for not less than six years, and then charged the defendant that he, not regarding his duty, had forged certificates of the latter description, for the purpose of inducing the examiners to pass him.*

*Held, a good indictment for forgery at common law.*

THE prisoner was charged, upon the following indictment, with forgery at common law.

Indictment.

Central Criminal Court, to wit.—The jurors for our Lady the Queen upon their oath present, that, heretofore and at the time of the committing the several offences in the first six counts of this indictment mentioned, certain persons, to wit, William Pixley, George Probyn, Charles Farquharson, and Edward Foord, as examiners for and on behalf of the Master, Wardens, and Assistants of the guild Fraternity or Brotherhood of the most glorious and undivided Trinity, and of Saint Clement in the parish of Deptford, in the county of Kent, commonly called the Corporation of Trinity House of Deptford Strond, were and had been in the habit of examining persons voluntarily submitting to such examination, touching and concerning their nautical skill, knowledge and capacities to navigate ships and vessels, and to grant to them, when capably qualified, certificates of their fitness to act in certain propeties, and amongst others as masters in and on board of ships and other vessels. And the jurors aforesaid, upon their oath aforesaid, do further present, that in order to enable such persons to be examined as aforesaid, and to obtain from the said examiners a certificate of such their fitness to act as masters of ships and vessels as aforesaid, it was, during all the times in the first six counts of this indictment mentioned, necessary that such persons should produce to the said examiners certificates of service and sobriety and general good character and conduct, and of their

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

(b) As no counsel were retained to argue the case before the Court of Criminal Appeal, no public discussion of it took place, and it does not therefore appear who were the judges who determined it.

having previously served at sea for not less than six years. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Pixley, George Probyn, Charles Farquharson, and Edward Foord, being such examiners as aforesaid, had in their possession divers pieces of paper of the value of one penny each, upon which said pieces of paper the said examiners were in the habit of granting to persons properly qualified, certificates of their fitness to navigate ships and vessels as masters thereof as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that Francis Emsley Toshack, late of the parish of Stepney, in the county of Middlesex, and within the jurisdiction of the said court, labourer, well knowing the premises, and having in his possession certain documents in the form of certificates, whereby it was made to appear, and it did appear, that the said Francis Emsley Toshack had served in various vessels in different capacities at sea for periods of time previously not amounting in the whole to the period of six years, in order to make it falsely appear to the said William Pixley, George Probyn, Charles Farquharson, and Edward Foord, as such examiners as aforesaid, that he had duly served at sea the residue of the term of six years, and unjustly to obtain from them as the said examiners one of the said pieces of paper of the value of one penny, being the certificate of the said examiners of the fitness of him the said Francis Emsley Toshack, to navigate and serve as a master in and on board of ships and other vessels, on the 5th day of May, in the year of our Lord 1849, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully, falsely, knowingly, subtilely, fraudulently and deceitfully did make, forge, and counterfeit a certain paper writing to the likeness and similitude of, and as and for a true and genuine writing of and under the hand of, one William Neilson, as the master of a barque, certifying that he the said Francis Emsley Toshack, in the said forged writing described as Francis Toshack, served with him the said William Neilson, as an ordinary seaman on board the barque Ruckers, of the burthen of 396 tons, for two voyages to St. Vincent, from the 16th day of August, in the year of our Lord 1841, till the 10th day of September, 1842, and that he the said Francis Toshack had conducted himself to the entire satisfaction of the said William Neilson, to the great damage, deception and prejudice of the said William Pixley, George Probyn, Charles Farquharson, and Edward Foord, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

REG.  
v.  
TOSHACK.  
—  
*Forgery at  
common law.*

*Indictment.*

*Seventh Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Francis Emsley Toshack afterwards, to wit, on the said 5th day of May, in the year of our Lord 1849 aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly, falsely, subtilely, fraudulently and deceitfully did make, forge and counterfeit a certain writing to the

*Seventh count.*

REG.  
v.  
TOSHACK.  
—  
*Forgery at  
common law.*

likeness and similitude of, and as and for a true and genuine writing of and under the hand of, one William Neilson, as the master of a barque and vessel called the Ruckers, certifying that he the said Francis Emsley Toshack, herein described as Francis Toshack, had served with the said William Neilson as ordinary seaman on board the said barque Ruckers, of the burthen of 396 tons, for two voyages to St. Vincent, from the 16th day of August, in the year of our Lord 1841, till the 16th day of September, 1842; and that he conducted himself to the entire satisfaction of the said William Neilson, with intent thereby and by means thereof to deceive, injure, prejudice and defraud William Pixley, George Probyn, Charles Farquharson, and Edward Foord, to the great injury and deception of the said William Pixley, George Probyn, Charles Farquharson, and Edward Foord, to the evil and pernicious example of all other persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

*Ninth count.*

*Ninth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Francis Emsley Toshack afterwards, to wit, on the said 5th day of May, in the year of our Lord 1849, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly, falsely, subtilely, fraudulently and deceitfully did make, forge and counterfeit a certain writing to the likeness and similitude of, and as and for a true and genuine writing of and under the hand of, one William Neilson, as the master of a barque and vessel called the Ruckers, certifying that he the said Francis Emsley Toshack, therein described as Francis Toshack, had served with the said William Neilson as ordinary seaman on board the said barque Ruckers, of the burthen of 396 tons, for two voyages to St. Vincent, from the 16th day of August, 1841, till the 16th day of September, 1842, and that he conducted himself to the entire satisfaction of the said William Neilson, with intent thereby and by means thereof to deceive, injure, prejudice and defraud the said Corporation of Trinity House, of Deptford Strond, to the great damage and deception of the said corporation, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

On being arraigned at the June Sessions of the Central Criminal Court, before Patteson, J., the prisoner pleaded guilty, but that learned judge entertaining some doubt as to whether the indictment could be sustained, he reserved the case for the opinion of the Judges of the Court of Criminal Appeal.

*November 28, 1849.*

*Judgment.*

ALDERSON, B., now delivered judgment as follows.—This was a case reserved by my brother Patteson. The indictment charged that the Corporation of the Trinity House were in the habit of

examining persons voluntarily submitting to such examination, touching their nautical skill, and granting them certificates to act as masters, and then proceeded to charge, that in order to enable persons to be examined and procure such certificates, it was necessary to produce to the examiners certificates of service, sobriety, and good conduct at sea for not less than six years, and then the charge against the defendant was, that he, not regarding his duty, had forged certificates of this latter description for the purpose of inducing the examiners to pass him, and that the Trinity House might suppose he was a qualified person from his nautical skill and fitness, and from his general character, to act as master. It is a very important public duty which the Trinity House have to discharge, important to owners of property of this description, and important to the lives of those entrusted to their care; and if insufficient seamen or persons otherwise than of good character and conduct are appointed, the unfortunate subordinates of the ship are often subjected to harsh and improper treatment. The defendant was charged in the 7th and 9th counts, to which alone the attention of the judges on the reserved case seems to have been directed, with a forgery at common law in forging the certificates which induced the Trinity House to grant him their fiat for acting as a master. My brother Patteson, when the prisoner pleaded guilty, entertained some doubt whether this amounted to the misdemeanor of a forgery at common law, and reserved the matter for the opinion of the judges. The question was discussed before the tribunal now constituted for the purpose. They took the case into their consideration, and they are of opinion, and they instructed me to say so, that the 7th and 9th counts of this indictment are quite sufficient to found a judgment upon, and that it does amount to a forgery at common law. Indeed it does amount to a very serious offence, if persons do forge certificates of this sort, and are found to utter them for the purpose of deceiving the Trinity House; and I hope the Trinity House in future will act upon this judgment, and will, in the exercise of their duty, see and punish with great severity those persons who shall be guilty of such conduct. I am quite sure that it is for the interest of the public that they should exercise a very rigid superintendence of this kind. Upon the 7th and 9th counts, therefore, when the defendant, who is at present at large, is taken, judgment will be pronounced.

REG.  
v.  
TOSHACK.  
—  
*Forgery at  
common law.*

# CENTRAL CRIMINAL COURT AND COURT OF CRIMINAL APPEAL.

SEPTEMBER SESSION, 1849.

January 19, 1850.

REG. v. SMITH.(a)

7 & 8 Geo. 4, c. 29, s. 8—*Construction of letter alleged to be a threatening one—Pleading over after judgment on demurrer—Mistake in reserved case.*

*After argument upon demurrer in a criminal case, it is in the discretion of the court to allow the demurrer to be withdrawn and a plea of not guilty entered.*

*Semble—Judgment for the Crown on a demurrer to an indictment for felony is not final, but one of respondeas ouster.*

*Where, on the trial of an indictment for felony, the counsel for the prisoner suggests that the interpretation of a written document is for the court, and their interpretation of it being against him, he asks to have the point reserved, and his request is acceded to, the jury being asked to decide upon the other facts of the case without reference to the construction of the document—*

*Quære, Whether, after conviction, the verdict can be disturbed on the ground that the construction of the paper was for the jury, and that they have expressed no opinion upon a material point which was peculiarly for their decision?*

*A letter addressed to the prosecutor, stating that a conspiracy has been entered into by certain persons to ruin him—that it will be shortly carried into effect, but that it is in the writer's power to prevent it, and that he will prevent it if a certain sum of money is deposited for him in a particular place by a specified time—is a threatening letter within the 7 & 8 Geo. 4, c. 29, s. 8.*

*Where the written case reserved does not, in the opinion of the counsel who were in it in the court below, fairly raise all the points that were in issue, the proper course is to apply to the judge reserving to amend it.*

THE prisoners were indicted, under 7 & 8 Geo. 4, c. 29, s. 8, for feloniously sending to Sir Walter Rockcliff Farquhar,

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

Baronet, and others, a letter demanding money, with menaces, and without any reasonable or probable cause.

The prisoners having pleaded "not guilty,"—before the jury were charged,

*Bodkin* (with whom was *Huddleston*), for the defence, applied to the court to quash the indictment, on the ground that the letter in question (and which is hereafter set out in the case reserved,) did not contain any threat or menace within the meaning of the statute.

The court declined to pursue that course, whereupon

*Bodkin*, on behalf of the male prisoner (the counsel for the prosecution having intimated that no evidence would be offered against the female), asked for permission to withdraw the plea, which being granted, he put in a demurrer to the indictment, and after a joinder in demurrer, proceeded to argue that the letter was not a threatening letter within the statute; that it contained no demand, but was merely a request; and that it could not be construed into a menace of a personal character. He quoted *R. v. Carruthers* (vol. 20 of the Sessions Papers of the Central Criminal Court, 821); and *R. v. Pickford* (4 C. & P. 227.)

PLATT, B., after consulting Williams, J.—The court, as at present advised, consider this letter so completely within the meaning of the act of Parliament, that—at all times reluctant to decide a point so as at once to put an end to such a prosecution on technical grounds—they have no hesitation in at once giving judgment in favour of the Crown. If we are wrong, the only way in which the question can be raised is by writ of error.

WILLIAMS, J., suggested that it might perhaps be expedient for *Bodkin* to withdraw the demurrer and plead "not guilty."

*Ballantine*, for the prosecution, contended that this could not now be done. The judgment upon a demurrer was final, and a writ of error was now the only course open to the prisoner.

WILLIAMS, J.—Do you contend that the court has no power to allow a party to withdraw a demurrer?

*Ballantine* submitted that it had not. The demurrer must now be taken to be part of the record, and judgment upon it duly given and recorded. The demurrer admitted the facts, and they were, therefore, no longer in dispute; but if the prisoner desired to bring the case before the Court of Criminal Appeal, he had no objection to treat the demurrer as a nullity, but then the defendant must plead "guilty;" but the defendant had no right to take the chance of the demurrer being determined in his favour, and, when the decision was against him, fall back upon a plea of "not guilty." It was true the point had not been expressly decided, but in *R. v. Bowen* (1 C. & K. 501), a suggestion was made by Tindal, C. J., that on a charge not capital, the defendant might be concluded by a judgment on demurrer against him.

*Huddleston* quoted *R. v. Purchase* (C. & M. 617), which was a case of embezzlement, and there Patteson, J., expressly held the party entitled to plead over, and this was expressed in the books

REG.  
v.  
SMITH.  
—  
*Threatening  
Letter—  
Pleading—  
Practice.*



REG.  
v.  
SMITH.  
— —  
*Threatening  
Letter—  
Pleading—  
Practice.*

to extend to all felonies in *favorem vitæ*: (Arch. Cr. Pl. 7th edit. 81.) But the question was not raised in this case, for the application was, to be permitted to withdraw the demurrer, which the court had clearly a discretion to allow; they might treat the case as though no judgment had been given, but a mere opinion expressed.

PLATT, B.—I have not the slightest doubt of the power of the court to allow the demurrer to be withdrawn at any time before judgment is actually given. The exercise of that power is entirely within their discretion. The practice has always been to allow a prisoner indicted for felony, if he fails upon demurrer, to plead over. The original ground of the rule was in *favorem vitæ*, but it is not to be said that, because a felon is not liable to be executed, that he is to lose that privilege. We decide that the demurrer may be withdrawn.

The prisoner then pleaded “not guilty.”

At the close of the case for the prosecution,

*Bodkin* again submitted that the letter was not one on which the indictment could be supported.

PLATT, B.—I will reserve that question, if you please, and you can go to the jury upon the facts.

*Bodkin*, in his address to them, made no point of the letter not being within the act of Parliament, but simply argued that the prisoner was not implicated in the transaction.

The prisoner was convicted, and the following case reserved.

#### REG. v. SMITH.

Case.

Thomas Smith, was convicted before my brother Williams and myself, at the last September Session of the Central Criminal Court, of having knowingly and feloniously sent to Sir Walter Rockliff Farquhar, Bart., and others, a letter directed to them by the names and description of Messrs. Herries, Farquhar, & Co., St. James's-street, demanding money of and from them, with menaces and without any reasonable or probable cause, against the form of the statute. At the close of the case for the prosecution, the prisoners' counsel submitted that the letter set forth in the indictment did not amount to a threatening letter within the meaning of the 7 & 8 Geo. 4, c. 29, s. 8. My brother Williams, and I, thought that it did, but reserved the point for the consideration of Her Majesty's judges sitting in a Court of Appeal. The letter, as set out, contained the following matter:—

Gentlemen,—You say that B. O. N. will accede to the terms proposed, and send part of the means to any place which may be named. You would have had an answer yesterday, but was prevented. If you act honestly by me, and not by any means deceive me, or allow any spy to watch me, I will save you or perish in the attempt, though I hazard my life in so doing, and must have means

sufficient at my disposal without delay, or all will be lost. I am fully assured that 20,000*l.* would not cover the horrid catastrophe which would not only stop your bank for a time, but perhaps for ever, as the books would all be destroyed. The match, the most dreadful and last resource, has been contemplated by the cracksmen or captain of this most horrid gang, which I fervently pray to be relieved from. I have never yet, so help me God, done a deed I am afraid or ashamed of, and the only way I can privately obtain means, will be the following: at the London end of Kensington Gardens, on the Knightsbridge side, there is a dyke, sloped, which divides the gardens from the park, and a carriage-road where the roads meet as you turn to ride or drive across the bridge, it is a short distance from the first bridge, where the keeper remains in the garden. By looking up that dyke you will see large iron pipes which convey water to the pond. A large elm tree stands between the park and the garden and there is sufficient room under the first pipe to place a small bag. If, therefore, you will send a man you can confide in, and lodge beneath that pipe 250 sovereigns, unseen by mortal eye, I swear by Almighty God, most solemnly, that the evil to which I have alluded shall be averted, if, when I have completed my task and informed you when all is safe, and denounced the villains, you will let me have 250*l.* more, which, if God prosper me, I will repay with gratitude, as I could not get into business for less than 500*l.* to obtain a respectable living. Let the money be lodged to-morrow, Saturday morning, by half-past eleven o'clock, not one moment sooner, and all shall be well with you; but if I am at all deceived, in any possible way, all must fall on yourself.

T. J. PLATT.

REG.  
v.  
SMITH.  
—  
*Threatening  
Letter—  
Pleading—  
Practice.*

Case.

## COURT OF CRIMINAL APPEAL.

(Before WILDE, C. J., ALDERSON, B., WIGHTMAN, J.,  
PLATT, B., and WILLIAMS, J.)

*January 19, 1850.*

*Bodkin* (for the prisoner), after reading the case, proceeded to contend that, whether the letter was a threatening one or not, within the 8th section of the 7 & 8 Geo. 4, c. 29, was a question for the jury and not for the court, and that the learned judge who tried the case below ought not to have taken upon himself to decide it.

WIGHTMAN, J.—But that question is not raised by the case before us. If it is not one of law, but one for the jury, then there is nothing for us to decide.

REG.  
v.  
SMITH.  
—  
*Threatening  
Letter—  
Pleading—  
Practice.*

*Bodkin* submitted that although the point he was upon was not specifically stated in the case, yet it might be gleaned from it. Since it was clear that the learned judge considered that it was a pure question of law for him to decide, the jury were never asked to say whether the letter was a threatening one or not, and it was clear from all the cases that the question was one for them.

ALDERSON, B.—I do not see how we can enter upon this matter now. We cannot travel out of the case reserved for us.

WILDE, C. J.—If the question did not raise the points you deemed important, you should have applied to the learned judge to amend it. I wish the bar generally to understand that where the case reserved does not in their judgment fully state the matter to be discussed, they may with great propriety apply for an amendment, and such application will always receive attention.

*Bodkin* submitted that no amendment was needed here, because it was evident that the jury had never given any opinion upon what it was most material for them to decide.

WIGHTMAN, J.—Why did you not go to the jury upon the matter yourself? What you asked of the learned judge he granted, but he did not restrain you from taking any course you thought fit.

*Bodkin*.—The application was not attended with any argument. Mr. Baron Platt merely said, I shall ask the jury whether they are satisfied that the prisoner sent the letter, and shall reserve the other question for the opinion of the judges.

ALDERSON, B.—It is clear that we have no power to assist you on that point. Your only course now is to endeavour to show that this case cannot be distinguished from *R. v. Pickford*. There the question was evidently not considered as one entirely for the jury.

*Bodkin* then contended that the letter in question contained no menace within the meaning of the act of Parliament. It might be that the question whether the letter contained any menace at all was for the jury to decide, but whether it was such an one as the statute contemplated was for the court. Here there was no threat emanating from the writer of the letter. He threatened to do nothing.

WILDE, C. J.—Your point is that he was not the person who was to do the mischief, although he “hopes to be able to separate himself from the gang.” That looks very much as if he was one of them.

*Bodkin* contended that it was not every threat that was within the meaning of the act of Parliament. Suppose a man were to demand money that he alleged to be due to him, and threaten that if it were not paid he would bring an action, that would be in one sense demanding money with menaces, but surely not in a criminal sense.

ALDERSON, B.—But there there would be reasonable cause.

*Bodkin* submitted that the true rule was laid down by Lord Ellenborough in *R. v. Southerton* (6 East, 126, 140.) His lordship there said, “To obtain money under a threat of any kind,

or to attempt to do it, is no doubt an immoral action, but to make it indictable the threat must be of such a nature as is calculated to overcome a firm and prudent man." Applying that test to the letter in question, it appeared to be a mere silly, clumsy contrivance to obtain money, but one not at all calculated to create fear or alarm in any rational individual. The letter in *Pickford's case* (a) appeared to be of much the same character as the present one, and was probably decided upon the ground suggested.

WILLIAMS, J.—The judges do not appear to have been unanimous in that case; probably the majority thought there was no sufficient evidence of a demand, but that it was merely a request to pay the money.

ALDERSON, B.—Here we have this sentence—"Let the money be lodged at half-past eleven, and all shall be well with you." Is not that a threat that if the money is not lodged some injury will occur?

*Bodkin* argued that even if the letter could be construed to be a threat, there was nothing to show that the writer was not actuated by feelings of benevolence towards the individual to whom it was sent.

*Ballantine*, for the prosecution, was not called upon.

## JUDGMENT.

WILDE, C. J.—I have listened with every respect to the Judgment. arguments that have been addressed to the court, but neither I nor my learned brothers entertain any doubt that this letter contains a demand of money within the statute, and a threat that if the application is not complied with mischief will ensue to the prosecutor. The object of the Legislature obviously was to prevent money being extorted from individuals by working upon their terrors, and we think its exigencies are satisfied where a man requires a sum of money to be paid to him by another, and holds out to the latter that certain dangers will accrue to him on refusal, in a way calculated to make him part with his money for the purpose of averting them. Lord Ellenborough's opinion has been

(a) The letter in that case was as follows:—

"SIR,—As you are a gentleman, and highly respected by all who know you, I think it my duty to inform you of a conspiracy. There is a few young men who have agreed among themselves to take from you personally a sum of money, or injure your property. I have overheard all the affair—I mean to say your building property. In the manner they have planned this dreadful undertaking would be a most serious loss. They have agreed to commence this upon an appointed time in the course of this winter, which will be a most dreadful sight. Sir, I could give you every particular information how you may preserve your property and your person, and how to detect and secure the offenders. Sir, if you will lay me a purse of 30 sovereigns upon the garden hedge close to Mr. Tatler's garden gate, I will leave a letter in the place to inform you of the night this is to take place. I can also inform you how you could be sure to secure the offenders, but you must keep all this quite secret, and not make a talk of it, as it will come to their ears, and then they would put it off to another time. Sir, I hope you will not attempt to seize upon me when I come to take up the money and lay down the note of information. Sir, you will find I am doing you a most serious favour. You will please excuse me in not describing my name, but I will make myself known the day after you have taken them, and be a witness against them. I shall come to lay down my letter on the 1st of December, if I find the money. Sir, I am, YOUR UNKNOWN FRIEND."

REG.  
v.  
SMITH.  
—  
*Threatening  
Letter—  
Pleading—  
Practice.*

REG.  
v.  
SMITH.  
—  
*Threatening  
Letter—  
Pleading—  
Practice.*

quoted, that the threat must be such an one as is likely to overcome a firm and prudent man. It would raise questions of very considerable difficulty indeed if we were bound in every case to speculate as to the amount of nervous susceptibility possessed by every individual to whom such a letter was sent. If the demand and the threat are such as would be likely to affect any man in a sound and healthy state of mind, we do not think it necessary to go further into the question of nervous energy. If, then, this letter contains a demand, how is it accompanied? It says that something dreadful will happen, which the payment of money will prevent. It expressly states that if the money be not paid in a certain time that the evil will occur; "20,000*l.* would not cover the horrid catastrophe;" "the match, the most dreadful and last resource, has been contemplated by the cracksman or captain of this most horrid gang;" and then, "if you will lodge beneath that pipe 250 sovereigns, unseen by mortal eye, I swear by Almighty God most solemnly that the evil shall be averted." We think that this is as clear and as detestable a demand and a menace as can reasonably be required. The decision in *R. v. Pickford* we do not mean to impugn. Every case of this nature must be judged of by its circumstances alone. The demand of money here is clear and explicit. The consequences denounced against refusal—namely, the ruin of the bank, is as obviously a threat. We are unanimously of opinion that the facts proved satisfy every portion of the statute.

*Judgment for the Crown.*

*Ballantine* for the prosecution.

*Bodkin* and *Huddleston* for the defence.

## CENTRAL CRIMINAL COURT.

NOVEMBER SESSION.

*November 29, 1849.*

(Before Mr. Justice CRESSWELL.)

REG. v. DEWITT.(a)

*Indictment under 6 & 7 Will. 4, c. 86, ss. 41 and 43.**In an indictment under the 43rd sect. of the 6 & 7 Will. 4, c. 86, for feloniously causing a false statement of the birth of a child to be inserted in a register, evidence that the prisoner came to the registrar and requested him to register a statement of a birth which was proved to be false, and it was so inserted by him, and the register completed :**Held, sufficient to support the indictment.**Semble—The difference between the 41st and the 43rd sections of that act is, that the former contemplates a case where the false information has been given, but no insertion in the register made; the latter where the information has not only been given, but acted upon and inserted by the registrar.*

**T**HE prisoner was charged upon the following indictment, which was drawn under the 43rd section of the 6 & 7 Will. 4, c. 86.

Central Criminal Court, to wit.—The jurors for our Lady the Queen, upon their oath present, that Mary Dewitt, the wife of Thomas Dewitt, late of the parish of Saint Clement Danes, in the county of Middlesex, labourer, on the 13th day of November, in the year of our Lord 1849, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, feloniously and wilfully did insert and cause to be inserted in a certain register book of births, to wit, the register book of births made and provided and kept under and according to the provisions of the statute in that behalf made and provided for registering births in the district of Saint Clement Danes, in the county of Middlesex aforesaid, a certain false entry of a birth, purporting to be the entry of the birth of a girl born of the body of one Ellen Daley, at a certain house numbered 17, in Ship-yard, Saint Clement Danes, on the 1st day of November, in the year of our Lord 1849, and which said false entry is as follows, that is to say—

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

" PAGE 27.

REG.  
v.  
DEWITT.  
*Indictment—*  
6 & 7 Will. 4,  
c. 86.

" 1849. BIRTHS in the District of ST. CLEMENT DANES, in the County of MIDDLESEX.

No.	When born.	Name, if any.	Sex.	Name and Surname of Father.	Name and Maiden Surname of Mother.	Rank or Profession of Father.	Signature, Description, and Residence of Informant.	When Registered.	Signature of Registrar.	Baptismal Name, if added after Registration of Birth.
	1st Nov. 1849. 17, Ship yard, St. Clement Danes.	Mary Ann.	Girl.	Matthew Daley.	Ellen Daley, formerly Cullen.	Stonemason	Ellen Daley, mother, 17, Ship-yard, St. Clement Danes.	13th Nov., 1849.	W. J. Jones, Registrar.	

whereas in truth and in fact no girl was born of the body of the said Ellen Daley on the 1st day of November, in the year of our Lord 1849, at the said house in Ship-yard, Saint Clement Danes, as in the said entry is falsely alleged and stated, and as the said Mary Dewitt, at the time of the making the said entry, well knew: and whereas in truth and in fact no girl whatsoever was born at the said house in Ship-yard, Saint Clement Danes, on the said 1st day of November, in the year of our Lord 1849, as in the said entry is falsely alleged and stated, and as the said Mary Dewitt, at the time of the making the said false entry, well knew: and whereas in truth and in fact the person who signed the said false entry as the informant of the particulars of the said supposed birth at the said house in Ship-yard, Saint Clement Danes, was not a person of the name of Ellen Daley, but was another and a different person, to wit, the said Mary Dewitt, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen her crown and dignity.

Second count.

*Second count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Mary Dewitt afterwards, to wit, on the said 13th day of November, in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, feloniously and wilfully did insert and cause to be inserted in a certain register book of births, made, provided, and kept under and according to the provisions of the statute in that behalf made and provided for registering births in the district of Saint Clement Danes, in the county of Middlesex aforesaid, a certain false entry of a birth, purporting to be the entry of the birth of a girl born of the body of one Ellen Daley, in the said house in Ship-yard, Saint Clement Danes, on the said 1st day of

November, in the year of our Lord 1849, and which said false entry is as follows, that is to say [entry same as in 1st count], whereas in truth and in fact no girl of the name of Mary Ann was born on the said 1st day of November, in the year of our Lord 1849, at the said house in Ship-yard, Saint Clement Danes, as in the said entry is falsely alleged and stated, and as the said Mary Dewitt, at the time of the making of the said false entry, well knew: and whereas in truth and in fact no child whatsoever was born at the said house in Ship-yard, Saint Clement Danes, of the body of the said Ellen Daley, on the said 1st day of November, in the year of our Lord 1849, as in the said entry is falsely alleged and stated, and as the said Mary Dewitt, at the time of the making of the said false entry, well knew, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

REG.  
v.  
DEWITT.  
—  
Indictment—  
6 & 7 Will. 4,  
c. 86.

*Third count.*—And the jurors aforesaid, upon their oath aforesaid, Third count. do further present, that the said Mary Dewitt afterwards, to wit, on the said 13th day of November, in the year of our Lord 1849, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, feloniously and wilfully did insert and cause to be inserted in a certain register book of births, to wit, the register book of births, made, provided, and kept under and according to the provisions of the statute in that behalf made and provided for registering births in the district of Saint Clement Danes, in the county of Middlesex aforesaid, a certain false entry of a birth, and which said false entry is as follows, that is to say [entry same as in 1st count], whereas in truth and in fact, and as the said Mary Dewitt then and there, and at the time of the making of the said false entry, well knew, no woman of the name of Ellen Daley, or of any other name whatsoever, had brought forth a child at the said house in Ship-yard, Saint Clement Danes, on the said 1st day of November, in the year of our Lord 1849, as in the said entry is falsely alleged and stated: and whereas in truth and in fact, and as the said Mary Dewitt, at the time of the making of the said false entry, well knew, no person of the name of Ellen Daley resided at the said house in Ship-yard, Saint Clement Danes, on the said 13th day of November, in the year of our Lord 1849, as in the said entry is falsely alleged and stated, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Fourth count.*—And the jurors aforesaid, upon their oath aforesaid, Fourth count. do further present, that the said Mary Dewitt afterwards, to wit, on the said 13th day of November, in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, in a certain register book of births, to wit, the register book of births made, provided, and kept under and according to the provisions of the statute in that behalf made and provided for registering births in the district of Saint Clement Danes, in the county of Middlesex aforesaid, and which said register book had then and there printed upon each side of every leaf of the said



REG.  
v.  
DEWITT.  
—  
*Indictment—*  
6 & 7 Will. 4,  
c. 86.

register book certain heads of information according to the provisions of the statute in that behalf made and provided, and which said printed heads of information upon each side of every leaf of the said book were as follows, that is to say [same as in 1st count], feloniously and wilfully did insert and cause to be inserted upon one side of a leaf of the said register book of births, under the said several printed heads of information respectively, a certain false entry, which said false entry, together with the said last-mentioned several printed heads of information made, constituted, and purported to be the entry of the birth of a certain female child named Mary Ann, born of the body of one Ellen Daley, at a certain house numbered 17, in Ship-yard, Saint Clement Danes, on the 1st day of November, in the year of our Lord 1849, and which said false entry is as follows, that is to say [entry same as in 1st count], whereas in truth and in fact, and as the said Mary Dewitt then and there, and at the time of the making of the said false entry, well knew, no girl named Mary Ann was born on the said 1st day of November, in the year of our Lord 1849, in the said house in Ship-yard, Saint Clement Danes, of the body of the said Ellen Daley, as in the said entry is falsely alleged and stated: and whereas in truth and in fact, and as the said Mary Dewitt then and there, and at the time of the making of the said false entry, well knew, no person of the name of Ellen Daley had brought forth a child at the said house in Ship-yard, Saint Clement Danes, on the said 1st day of November, in the year of our Lord 1849, as in the said entry is falsely alleged and stated: and whereas in truth and in fact, and as the said Mary Dewitt then and there, and at the time of the making the said false entry, well knew, no person of the name of Ellen Daley resided at the said house in Ship-yard, Saint Clement Danes, as in the said entry is falsely alleged and stated: and whereas in truth and in fact the person who signed the said false entry as the informant of the particulars of the said supposed birth at the said house in Ship-yard, Saint Clement Danes, was not a person of the name of Ellen Daley, as in the said entry is falsely alleged and stated, but was another and a different person, to wit, the said Mary Dewitt, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Fifth count.

*Fifth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Mary Dewitt afterwards, to wit, on the said 13th day of November, in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, feloniously and wilfully did insert and cause to be inserted in a certain register book of births, to wit, the register book of births made, provided, and kept under and according to the provisions of the statute in that behalf made and provided for registering births in the district of Saint Clement Danes, in the county of Middlesex aforesaid, a certain false entry of a birth, that is to say, of the birth of a girl of the body of one Ellen Daley, at a certain house numbered 17, in Ship-yard, Saint Clement Danes,

in the parish aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

REG.  
v.  
DEWITT.

The evidence established that the woman had gone to the registrar of the district in which she lived, and requested to have a child registered. The registrar asked her the usual questions as to whether she was the mother, where and when the child was born, its sex, &c., and her answers were entered in the register book. She was asked her name, and she gave that of Ellen Daley, and so signed the register. The registrar signed his name, and the register was completed. It was clearly proved that these answers were false, and that her name was Dewitt.

Indictment—  
6 & 7 Will. 4,  
c. 86.

*Prendergast*, jun., for the defence, contended that the 43rd section of the act did not apply to a case like this, which rather came within the 41st section.<sup>(a)</sup> If this was a felony, it was difficult to say what was a misdemeanor under the 41st sect. The prisoner did no more than make a statement and give information; the inserting it in the book was the act of the registrar. Surely an act of his could not make that a felony which, without it, would be a mere misdemeanor.

*Bodkin*, for the prosecution, said that there was some doubt in the mind of the registrar-general as to whether the 43rd section did apply to a case like this, although he himself had framed the indictment in accordance with what seemed to him to be the law. It had been suggested that possibly the 43rd section was only meant to apply to cases in which there had been an improper interference with a register already completed, otherwise there would be scarcely any necessity for the 41st section, as the offence there referred to would, without the act, have been punishable as a misdemeanor, being an attempt to commit a felony. If there was any doubt about the construction, it would be more satisfactory that the point should be reserved.

CRESSWELL, J. (after consulting Alderson, B., who was in the adjoining court.)—My learned brother Alderson concurs with me that if the prisoner applied to the registrar to insert a certain statement, and he did insert it, that she in truth caused it to be inserted within the 43rd section of the statute. As to the act of the registrar making that a felony which would otherwise be a misdemeanor, try it in this way:—A. gives poison to B., with directions that he

(a) The 41st section is as follows:—

“And be it enacted, that every person who shall wilfully make, or cause to be made, for the purpose of being inserted in any register of birth, death, or marriage, any false statement touching any of the particulars herein required to be known and registered, shall be subject to the same pains and penalties as if he were guilty of perjury.”

43rd sect.—“And be it enacted, that every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any such register book, or any part or certified copy of any part thereof, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of any such register book or certified copy thereof, or shall wilfully insert, or cause to be inserted, in any register book or certified copy thereof, any false entry of any birth, death, or marriage, or shall wilfully give any false certificate, or shall certify any writing to be a copy or extract of any register book, knowing the same register to be false in any part thereof, or shall forge or counterfeit the seal of the register office, shall be guilty of felony.”

REG.  
v.  
DEWITT.

should administer it to C., B. suspects it to be poison, and does not administer it. A. will have been guilty of a misdemeanor. But suppose B. has no suspicion, administers the poison, and C. dies, then A. is guilty of murder; and yet his act was the same in both cases. Entertaining no doubt upon the point, I decline to reserve it.

*The prisoner was convicted.*

## CENTRAL CRIMINAL COURT.

AUGUST SESSION, 1849.

*August 21, 1849.*

REG. v. JACOBS AND TARRANT. (a)

*Evidence—Confession made upon inducement.*

*An inducement or threat offered by a master to one of two apprentices jointly accused of larceny will not, though offered in the presence of the other, preclude the reception in evidence of a confession immediately made by the other.*

THE prisoners were indicted for larceny. It was proved that they were apprentices in the service of the prosecutor, and that he, suspecting Tarrant had robbed him, told him that if he did not confess he would send for a constable. Jacobs was near at the time, and could hear what took place. Tarrant then said that he had robbed him (the prosecutor), and that Jacobs had robbed him too. Jacobs then came forward and said, "You are a liar; I have only taken one handkerchief."

*Parry* (for the prisoner Jacobs) contended that the statement made by him was inadmissible. A threat had been made by the prosecutor in the presence of Jacobs, who might well believe that the threat applied to him as well as to Tarrant, and it was the influence of that threat that procured the confession.

*Clarkson*, for the prosecution.—The statement of Jacobs is certainly admissible. No threat was made to him, and his statement seems to have been drawn from him rather by what was said by the other prisoner than by the master.

The *Common Serjeant* (after consulting Mr. Justice Erle).—I have consulted Mr. Justice Erle, and he entirely agrees with me, that an inducement or threat offered to one person cannot affect the admissibility of a confession made by another, although that other happened to be present when the inducement was offered.

The prisoners were convicted.

*Clarkson* for the prosecution.

*Parry* for the prisoner Jacobs.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

## CENTRAL CRIMINAL COURT.

DECEMBER SESSION, 1849.

*December 19, 1849.*

(Before Mr. Justice COLERIDGE and Mr. Baron ROLFE.)

REG. v. MONKHOUSE. (a)

*Wounding with intent to murder.*

*How far on such an indictment proof of drunkenness on the part of the prisoner, at the time of the alleged act, should influence the jury in deciding the question of intent.*

THE prisoner was indicted for feloniously discharging a loaded pistol at John Farmer Monkhouse, with intent to murder him. Other counts stated his intent to be to maim and disable and to do grievous bodily harm.

*Ballantine* (with whom was *Huddleston*) for the defence, called witnesses who deposed to the prisoner's having been in a state of intoxication shortly before the time when the act was committed, and in his address to the jury argued that, to justify them in finding the prisoner guilty of the full offence, they must be satisfied, quite independently of any considerations derived from the nature of the act itself, that the prisoner had in his mind at the time one of the intents laid in the indictment. It was not enough to warrant a verdict on the first count, that if the prosecutor had died the crime would have amounted to murder; and he cited *Reg. v. Cruise* (8 C. & P. 546.) The charge there was an attempt to murder a child, and *Patteson, J.*, in charging the jury, said "You must be satisfied that when he inflicted the violence he had in his mind a positive intention of murdering that child; and even if he did it under circumstances which would have amounted to murder, if death had ensued, that would not be sufficient, unless he actually intended to commit murder." "It appears that the prisoner was drunk, and although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence."

COLERIDGE, J. (to the jury.)—There are two points for your Judgment. consideration,—first, as to the act; second, as to the intent. With regard to the latter, the allegation respecting it in the indictment must, no doubt, be proved to your satisfaction, before you can find the prisoner guilty upon the full charge. The inquiry as to intent is far less simple than that as to whether an act has been

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

REG.  
v.  
MONKHOUSE.  
—  
*Wounding  
with intent.*

Judgment.

committed, because you cannot look into a man's mind to see what was passing there at any given time. What he intends can only be judged of by what he does or says, and if he says nothing, then his acts alone must guide you to your decision. It is a general rule in criminal law, and one founded on common sense, that juries are to presume a man to do what is the natural consequence of his act. The consequence is sometimes so apparent as to leave no doubt of the intention. A man could not put a pistol which he knew to be loaded to another's head, and fire it off, without intending to kill him; but even there the state of mind of the party is most material to be considered. For instance, if such an act were done by a born idiot, the intent to kill could not be inferred from the act. So, if the defendant is proved to have been intoxicated, the question becomes a more subtle one; but it is of the same kind, namely, was he rendered by intoxication entirely incapable of forming the intent charged? The case cited is one of great authority, from the eminence of the learned judge who decided it. The only difficulty is, in knowing whether we get the very words of the judge from the case quoted; and even if we do, whether all the facts are stated which induced him to lay down the particular rule. Although I agree with the substance of what my brother Patteson is reported to have said, I am not so clear as to the propriety of adopting the very words. If he said that the jury could not find the intent without being satisfied it existed, I shall so lay it down to you: the only difference between us is as to the amount and nature of the proof sufficient to justify you in coming to such a conclusion. Under such circumstances as these, where the act is unambiguous, if the defendant was sober, I should have no difficulty in directing you that he had the intent to take away life, where, if death had ensued, the crime would have been murder. Drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention. Such a state of drunkenness may no doubt exist. To ascertain whether or not it did exist in this instance, you must take into consideration the quantity of spirit he had taken, as well as his previous conduct. His conduct subsequently is of less importance, because the consciousness (if he had any) of what he had done might itself beget considerable excitement. You must not find him guilty of one of these intents on mere guess, but, on the other hand, I am bound to tell you that if you think one or all of them existed, there is evidence sufficient, in point of law, to justify you in saying so.

The prisoner was found guilty, on the count charging an intent to do grievous bodily harm.

*Bodkin* for the prosecution.

*Ballantine* and *Huddleston* for the defence.

## CENTRAL CRIMINAL COURT.

NOVEMBER SESSION.

*November 29, 1849.*

REG. v. FRANCES. (a)

*Insanity—Evidence—Examination of medical witnesses.*

*On a trial for murder, evidence was called on the prisoner's behalf, to prove his insanity. A physician, who had been in court during the whole trial, was then called on the part of the prosecution, and asked whether, having heard the whole evidence, he was of opinion that the prisoner, at the time he committed the alleged act, was of unsound mind? Held, notwithstanding the opinion of the judges in Reg. v. McNaghten (1 C. & K. 130), that such a question ought not to be put, but that the proper mode of examination was to take particular facts, and assuming them to be true, to ask the witness whether, in his judgment, they were indicative of insanity on the part of the prisoner at the time the alleged act was committed?*

**THE** prisoner was indicted for wilful murder. The defence was that the prisoner, at the time he committed the act which caused the death, was in a state of insanity, and witnesses were called on the part of the prisoner to show that insanity had existed in many members of the prisoner's family, and that he himself had been insane three years previous. At the close of the case for the defence, a physician, who had been in court during the whole case, was put into the witness-box, and asked by

*Bodkin* (for the prosecution), whether, from all the evidence he had heard both for the prosecution and the defence, he was of opinion that the prisoner, at the time he did the act in question, was of unsound mind?

**ALDERSON, B.**—I cannot allow such a question to be put.

*Bodkin* quoted the case of *Reg. v. McNaghten* (8 Scott's N. R. 595, 1 C. & K. 130), in which the judges, in stating their opinions to the House of Lords, observed, that such a question might be put. The following question was submitted to them: "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time?"

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

REG.  
v.  
FRANCES.  
—  
*Evidence—  
Insanity.*

The answer of the judges was this: "We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible; but where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

CRESSWELL, J.—That case decides that the question cannot be put as a matter of right.

ALDERSON, B.—And I do not think it ought to be put at all. I am quite sure that decision was wrong. The proper mode is to ask what are the symptoms of insanity, or to take particular facts, and, assuming them to be true, to ask whether they indicate insanity on the part of the prisoner. To take the course suggested is really to substitute the witness for the jury, and allow him to decide upon the whole case. The jury have the facts before them, and they alone must interpret them by the general opinions of scientific men.

CRESSWELL, J. concurred.

The prisoner was acquitted.

*Bodkin* and *Clerk* for the prosecution

*Ballantine* and *Robinson* for the defence.

## CROWN CASE RESERVED.

## COURT OF CRIMINAL APPEAL (IRELAND).

AT THE JUDGES' CHAMBERS, FOUR COURTS, DUBLIN.

December 8, 1849.

(Before BLACKBURN, C. J. Q. B., DOHERTY, C. J. C. B.,  
PERRIN, J., BALL, J., and JACKSON, J.)

REG. v. OTWAY. (a)

*Statute 11 & 12 Vict. c. 2, Prevention of Crime and Outrage  
(Ireland) Act.*

*In an indictment against a traverser, under 11 & 12 Vict. c. 2, for having in his possession, in a proclaimed district, fire-arms and ammunition, without licence, it was averred that the proclamation and notice required by the act had been duly published in the Dublin Gazette, and duly posted according to the provisions of the act. No proof of posting throughout the entire district mentioned in the proclamation having been given, and the traverser being convicted on case reserved, pursuant to 11 & 12 Vict. c. 78, for the Court of Criminal Appeal, the principal question was, whether it was necessary to prove the posting of the proclamation as directed by the 2nd section to sustain the conviction?*

*Held, that the 2nd count of the indictment, framed under the 9th section, was sufficiently sustained, as it was only necessary to prove the issuing of the proclamation to sustain a conviction for carrying arms contrary to the provisions of the 9th section, and that the averment "and duly posted" was an immaterial and unnecessary averment, which did not require to be proved, and might be struck out as mere surplusage, and that the conviction on the 2nd count was right.*

THE following case was reserved from the Session of the Commission of the Court of Oyer and Terminer and Gaol Delivery, held at Green-street, Dublin, on the 25th day of October, 1849. Crampton and Ball, Justices.

## CASE.

Samuel Otway was tried before Judge Crampton and myself, at the last commission for the county of the city of Dublin, on an indictment under the 11 & 12 Vict. c. 2, for having in his possession, in a proclaimed district, fire-arms and ammunition without licence.

(a) Reported by RICHARD B. McCausland, Esq., Barrister-at-Law.



REG.  
v.  
OTWAY.  
—  
*Prevention of  
Outrage Act  
(Ireland.)*

It was averred in the indictment, that the proclamation and notice required by the act had been duly published in the *Dublin Gazette*, "and duly posted according to the provisions of the act."

By the 2nd section of the 11 Vict. c. 2, it is enacted "that printed copies of every proclamation issued thereunder shall be posted on or near to the doors of all places of public worship, and of every police station and barrack within the district named in such proclamation. By the 11th section of the same statute it is enacted, "that from and after the day named in such proclamation, it shall be lawful for the Lord-Lieutenant, by notice to be published in the *Dublin Gazette*, and posted as hereinbefore mentioned, to require all persons on or before a day to be named in such notice, to bring in and deposit their arms as therein mentioned."

The fact of the traverser having had the arms and ammunition in his possession, as charged in the indictment, was established. It was also proved that the proclamation had been posted on every police station, and every military barrack in the county of the city of Dublin, and on several places of public worship within the A division of police, being part of the county of the city of Dublin: Also, that the notice required by the act had been posted in or near the doors of all places of public worship and police stations, within the A division of police.

Case.

The district named in the proclamation comprised the entire of the county of the city of Dublin, and no proof was made of the posting of the proclamation or notice in any part of that district, save as above mentioned.

On the part of the traverser it was insisted, that the offence charged by the indictment had not been established, inasmuch as it had not been proved that the proclamation and notice had been posted on every place of public worship and every police station and barrack throughout the entire county of the city of Dublin, being the district named in the proclamation. Counsel for the crown and the other side, contended, that in respect of the posting of the proclamation and notice required by the 2nd and 11th sections the act was directory only, and that sufficient publicity was given to both documents by the posting which had been proved. We reserved the question as to the sufficiency of the posting, for the consideration of the judges, under the 11 & 12 Vict. c. 78, and we left the case to the jury, who found the prisoner guilty.

We postponed sentence until the question should be considered and decided, and in the meantime we admitted the traverser to bail.

(Signed)

N. BALL.

Indictment.

County of the city of Dublin, to wit.—The jurors for our Lady the Queen, upon their oath, do say and present, that after the 20th day of December, which was in the year of our Lord 1847, to wit, upon the 18th day of July, in the year of our Lord 1848, his Excellency the Lord-Lieutenant of Ireland, by and with the advice of the Privy Council of Ireland, did, in pursuance and execution of an act passed in the eleventh year of our Sovereign

Lady the now Queen, intituled "An Act for the better Prevention of Crime and Outrage in certain parts of Ireland, until the 1st of December, 1849, and to the end of the then next Session of Parliament," at Dublin, in the county of the city of Dublin, declare by proclamation, then and there duly published in the *Dublin Gazette*, and also then and there duly posted, with an abstract of the provisions of the said act at the foot, according to the provisions of the said act, that from and after the 20th day of July, 1848, in the said proclamation mentioned, the said act should apply to and be in force for the county of the city of Dublin. And the jurors aforesaid, upon their oath aforesaid, do further say and present, that after the said 20th day of July, named in the said proclamation, and whilst the said act was and continued to be in full force and effect in and for the said county of the city of Dublin, to wit, upon the 21st day of July, 1848, at Dublin, within the said county of the city of Dublin, his Excellency the Lord-Lieutenant of Ireland did, by notice then and there duly published in the *Dublin Gazette*, and then and there duly posted according to the provisions of the said act, require all persons not being justices of the peace, or persons in Her Majesty's naval or military service, or in the service of the revenue, or in the police or constabulary force, or special constables, or persons duly licensed to kill game, or persons to whom any licence had been granted under the said act, residing or being within the district included in the said proclamation, that is to say, within the said county of the city of Dublin, on or before the 25th day of July, 1848, to deposit and leave at \_\_\_\_\_, within the said district, or at the police station or barrack nearest to his, her or their residence, all and every gun or guns, pistol or pistols, or other fire-arm or fire-arms, and any part or parts of any gun, pistol or other fire-arms, and any sword or swords, cutlass or cutlasses, pike or pikes, bayonet or bayonets, and any bullets, gunpowder and ammunition, which he, she or they may have in his, her or their custody, power or possession. And the jurors aforesaid, upon their oath aforesaid, do further say, that after the said 25th of July, 1848, in the said notice mentioned, and whilst the said proclamation was in force and not revoked, and whilst the said act did apply to the said county of the city of Dublin, Samuel Otway, late of James's-street, in the said county of the city of Dublin, being an evil-disposed person, on the 6th day of August, in the 13th year of the reign of our said Sovereign Lady the now Queen, at Dublin aforesaid, within the said county of the city of Dublin, specified in the said proclamation and notice, unlawfully, knowingly, and contrary to the provisions of the said act, had in his custody, power and possession, one pistol, fifty-seven bullets, fifty ball-cartridges, and half-a-pound weight of gunpowder, then and there not being a justice of the peace (as negativing the exceptions), against the peace of our said Lady the Queen, her crown and dignity, and contrary to the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath

REG.  
v.  
OTWAY.  
—  
*Prevention of  
Outrage Act  
(Ireland.)*

Indictment.

Second count.

REG.  
v.  
OTWAY.  
—  
*Prevention of  
Outrage Act  
(Ireland.)*

aforesaid, do further say and present, that after the 20th day of December, which was in the year of our Lord 1847, to wit, upon the 18th day of July, in the year of our Lord 1848, his Excellency the Lord Lieutenant of Ireland, by and with the advice of the Privy Council of Ireland, did, in pursuance and execution of an act passed in the 11th year of the reign of our Sovereign Lady the now Queen, intituled "An act" (as in the 1st count) at Dublin, in the county of the city of Dublin, declare by proclamation, then and there duly published in the *Dublin Gazette* (and then and there duly posted, with an abstract of the provisions of the said act at the foot, according to the provisions of the said act), that from and after the 20th day of July, 1848, in the said proclamation mentioned, the said act should apply to, and be in force for, the county of the city of Dublin. And the jurors aforesaid, upon their oath aforesaid, do further say, that after the said 20th day of July, 1848, and whilst the said proclamation was in force, and not revoked, and whilst the said act did apply to the said county of the city of Dublin, the said Samuel Otway, on the said 6th day of August, in the 13th year of the reign of our said Sovereign Lady the now Queen, at Dublin aforesaid, in the said county of the city of Dublin aforesaid, specified in the said proclamation, unlawfully, knowingly, and contrary to the provisions of the said act, did carry and have, within the said county of the city of Dublin, elsewhere than in his dwelling-house, to wit, on the person of him the said Samuel Otway aforesaid, in the said county of the city of Dublin aforesaid, one pistol, fifty-seven bullets, fifty ball-cartridges, and half-a-pound weight of gunpowder, the said Samuel Otway, then and there not being a justice of the peace, and not being a person in Her Majesty's naval or military service, or in the coast-guard service, or in the service of the revenue, or in the police or constabulary force, and not being a special constable, or a person duly licensed to kill game, and not being a person to whom a licence was granted under the said act, and not, &c., against the peace, &c., and contrary to the form of the statute, &c.

Argument of  
J. A. Curran for  
traverseer.

*John Adye Curran*, for the prisoner.—The indictment contains two counts: the 1st, in substance, that the prisoner, on the day in question, had in his custody, power and possession, certain fire-arms and ammunition, he not being a person within any of the exceptions contained in the act 11 & 12 Vict. c. 2, and not being a person to whom a licence to carry arms had been granted under said act; the 2nd count, in substance, that he had same, on the day in question, elsewhere than in his dwelling-house, that is to say, upon his person, he not being within any of the said exceptions, and not having a licence to carry arms as aforesaid. The 1st count is framed under the 12th sect. of the act 11 Vict. c. 2; the 2nd count is framed under the 9th sect. of the same act. The fact that the prisoner had the arms in his possession on the day in question was proved at the trial, but the crown failed in proving the legal posting of the Lord Lieutenant's proclamation, and of the abstract and notice as required by the act. The proclamation comprised the entire of the county

of the city of Dublin, and the posting was proved to have been made in certain places within the A division of police of the Dublin metropolis, being but a part of the county of the city of Dublin. The preamble of the act recites that "in consequence of the prevalence of crime and outrage in certain parts of Ireland, it is necessary to make provision for the better *prevention* thereof,"—not for the *punishment* thereof. The 2nd sect. of the act directs "that printed copies of every proclamation issued under this act shall be posted on or near the doors of *all* places of public worship, and of *every* police station and barrack *within the district named in such proclamation*; and at the foot of every copy of any such first-mentioned proclamation so posted as aforesaid, an abstract of the provisions of this act shall be printed for the *information* of all persons affected by the enactments here contained." The substance of the 11th sect. is, that "from and after the day named in such proclamation, it shall be lawful for the Lord Lieutenant, &c. by notice to be published in the *Dublin Gazette*, and posted as thereinbefore mentioned, to require all persons (not therein excepted or duly licensed,) residing within such proclaimed district, or any part thereof, on or before a day to be named in such notice, to deposit and leave at a place or places to be named in such notice, or at the nearest police station or barrack, any fire-arms, ammunition, &c. which he, she or they might have in his, her or their custody, power or possession." No offence could be committed under the act unless the proclamation, abstract, and notice shall have been posted on or near to the doors of *all* places of public worship, and of every police station and barrack, within the district named in the proclamation.

R. & O.  
v.  
OTWAY.  
—  
*Prevention of  
Outrage Act  
(Ireland.)*

DOHERTY, C. J.—It was proved that the posting took place in a certain portion of the district comprised in the proclamation, and there was no proof one way or other with respect to the remaining portion of that district.

*Curran.*—To sustain the 1st count, the averment of the posting contained in the indictment is material, and not merely matter of inducement; and the averment that *the notice was duly posted according to the provisions of the act* must be fully borne out in proof before a legal conviction can be had upon the 1st count. In the 2nd count the posting of the notice is also averred.

*The Attorney-General.*—The offence contemplated by the 2nd count does not require the posting of the notice at all.

*Curran.*—But having averred the posting of the notice in the 2nd count, it becomes necessary to prove the averment as laid, and that will take the case out of the 9th sect. of the act, and bring it within the 12th section.

BALL, J.—The evidence given on the part of the crown may have been sufficient to sustain the 2nd count, though not sufficient to sustain the 1st count.

*Curran.*—Why did the Legislature insert in the act the words "*all*" and "*every*," but for the information of "*all*" persons to be affected by the act? Would the publication in the *Dublin Gazette*

REG.  
v.  
OTWAY.  
—  
*Prevention of  
Outrage Act  
(Ireland.)*

of the proclamation, or of the notice, be sufficient without the posting of them in the manner directed by the act? Where is the limit to be put? It may be contended that they were *substantially* posted according to the act: this is a penal act, requiring notification of its provisions. It is not a statute to be noticed by all persons, but it is the Lord Lieutenant's proclamation which makes its provisions have the effect of a law. Take, for example, the counties of Cork or Mayo, where the baronies are forty or fifty miles off. If the entire county were proclaimed, would posting in one barony be a sufficient notification to all persons that might be affected by the provisions of the act? Suppose, in such a case, the arms were required by the notice to be delivered up on the day next after posting of the notice. The word "shall" is used in the 2nd section, not the words "shall or may;" and where the word "shall" is used the act is construed to be *mandatory*, not *directory*, as an act is sometimes construed where the words "shall and may" are used. The posting of the notice, as required by the act, constitutes the basis of the offence, and without such posting there can be no offence, and no penalty can be incurred.

BLACKBURN, C. J.—That may be true as to the 1st count, which is framed under the 12th sect.; but the 2nd count is framed under the 9th section.

BALL, J.—There is no *posting* of the notice averred in the 2nd count; if it were, it would be surplusage.

Curran.—The 2nd sect. of the act requires the posting of the proclamation and abstract to be made on or near the doors of *all* places of public worship, and of every police station or barrack within the proclaimed district; the 11th sect. requires the posting of the notice to be had in the same manner as before directed by the 2nd sect. as to the proclamation and abstract. Would posting of the notice in the Lower Castle-yard be sufficient, and there is a place of public worship there, and a police barrack? If not, where is the limit to be put? Would publication in the *Gazette* be sufficient?

PERRIN, J.—It was conceded by the Crown at the trial that the posting was not had on all the places specified in the statute, but it was contended on the part of the Crown that the statute in that respect was only directory. The indictment contains an averment that the proclamation and abstract were "duly posted according to the provisions of the act," and your argument is, that the Crown were bound to prove that averment; and that part of the indictment cannot be severed as in *Bristow v. Wight* (Douglas, 665), but the whole averment must be proved as laid, though perhaps it was not necessary to have introduced that averment into the indictment.

Curran.—The 21st sect. of the statute makes the production of the *Dublin Gazette* conclusive evidence of the *issuing* of the proclamation, &c. but it does not make it evidence of the *posting* of any of those documents, nor could it do so. The act is *mandatory* as to the posting, and therefore the provisions of the act as to the

posting must be complied with to the fullest extent. If it were only directory, there need be no posting at all of the proclamation, abstract, or notice; but if it be mandatory, then the posting is compulsory, and must be made according to the provisions of the statute in their full extent. It was the manifest intent of the statute that no person should be deprived of the undoubted right of every British subject to carry arms, unless the terms of this statute, in derogation of that right, shall be strictly complied with. In *Davison v. Gill* (1 East, 64), where the word "*shall*" alone was employed in an act of Parliament, Lord Kenyon, in his judgment (p. 72), says "the words of the act are peremptory, 'that the forms of proceedings set forth in the schedule annexed *shall be used* (not the usual words *shall and may*) on all occasions, with such additions or variations *only* as may be necessary to adapt them to the exigencies of the case.' I cannot, therefore, say that these words are merely directory." Dwarria on Statutes (p. 704) lays down the duty of a judge, in construing an act of Parliament, to be, "in a land jealous of its liberties, to give effect to the expressed sense, or words, of the law, in the order in which they are found in the act, and according to their fair and ordinary import and understanding." And in *The King v. The Inhabitants of Barham* (8 Barn. & Cr. 99), Lord Tenterden, in his judgment (p. 104), says, "our decision may, perhaps, in this particular case, operate to defeat the object of the 59 Geo. 3; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the Legislature." And in *The Sussex Peerage case* (11 Cl. & Fin. 86), Lord Chief Justice Tindal, in his judgment (p. 143), says, "the only rule for the construction of acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver." And in *The Mayor, &c. of Salford v. Ackers* (16 Mee. & Wels. 85), Rolfe, B., in his judgment (p. 93), says, "no doubt there may be such difficulties; but they are difficulties which those who obtained the act have brought on themselves, and cannot in any way be allowed to affect third persons. They are, moreover, difficulties which exist in precisely the same force and extent, whatever be our decision on this demurrer."

BALL, J.—In the 2nd count there is an averment of the posting of the proclamation and abstract, but not of the notice.

BLACKBURNE, C. J.—An indictment which follows the words of the statute is a good indictment, and for the offence contemplated by the 9th section it is not necessary to aver any posting at all.

DOHERTY, C. J.—By the manner in which the averment has been made in the 2nd count, has the posting of the proclamation been stated as forming a necessary ingredient in the offence?

REG.  
v.  
OTWAY.  
—  
*Prevention of  
Outrage Act  
(Ireland.)*

REG.  
v.  
OTWAY.  
—  
*Prevention of  
Outrage Act  
(Ireland.)*

Curran for the  
prisoner.

*Curran.*—The prisoner has been convicted of having arms in his possession *after* the posting of the notice; he might have had some other defence if the indictment had been otherwise framed. The averment in the 2nd count of the posting of the proclamation and abstract, and of the notice, is all one general averment, and after conviction no part of it can be rejected as surplusage. [BLACKBURN, C. J.—If the posting of the notice be of the essence of the crime contemplated by the 9th section, your position would be correct.] It is a material averment in both counts that the proclamation was *duly* posted, and the crown are bound to prove that it was posted in the manner required by the 2nd section. [BALL, J.—The 9th section does not mention anything of the publication of the proclamation in the *Gazette*. Do you mean to contend that the indictment would be bad if it only stated the offence to have been committed after the issuing of the proclamation? BLACKBURN, C. J.—The words “such first-mentioned,” which occur in the subsequent sections, import that the proclamation was duly published. BALL, J.—The proclamation mentioned in the 1st section is a proclamation to be published in the *Dublin Gazette*.] It is a proclamation “*to be*” published; it is a document not complete until publication. [BLACKBURN, C. J.—It could not be a proclamation until it was published in the *Gazette*: there is no such thing as a private proclamation.] There are many cases in criminal pleading in which it is necessary that more should be averred than the mere words of the statute creating the offence; *ex. gr.*, in the case of an indictment for false pretences. [PERRIN, J.—By the 21st section it is enacted “that the production of the *Dublin Gazette*, purporting to be printed by the Queen’s printers, containing the publication of any proclamation, warrant, or notice under this act, shall be deemed and taken to be conclusive evidence in all courts of justice in Ireland of all such facts and circumstances as were or shall be necessary to authorize the issuing of any such proclamation, warrant, order, or notice; and every such proclamation, warrant, order, and notice shall be deemed and taken in all such courts respectively, to all intents and purposes whatsoever, to have been issued in conformity with this act.” Is not the production of the *Gazette* sufficient evidence of the publication of the proclamation? If there were one thousand places of public worship, would the omission to have posted the proclamation on one of them be fatal?] The argument *ab inconvenienti* is not allowed to prevail in criminal cases. [PERRIN, J.—What the Legislature intended is to be collected from the language they have used.] If the indictment only averred the *issuing* of the proclamation, would the production of the *Dublin Gazette* be sufficient proof to convict a prisoner upon an indictment framed under the 9th section? Clearly not; it would be repugnant to the letter as well as to the spirit of the act. [BLACKBURN, C. J.—The question of the manner of pleading this act of Parliament is quite distinct from the evidence which may be necessary to support a count correctly framed upon the act. A count is good if it follow the words of the act of Parliament creating the offence.]

*The Attorney-General*, for the crown.—The particular case now before the court, is not, perhaps, of great importance with respect to the party who has been convicted, but it is necessary for the future guidance of the crown with respect to proceedings under this act, that this question should be settled. The offences stated in the two counts of the indictment are quite distinct. The 2nd count is framed on the 9th section of the act for having arms and ammunition elsewhere than in the dwelling-house, that is to say, on the person, contrary to the form of statute in such case made and provided; and, if the conviction can be sustained upon the 2nd count, it will not be necessary on the part of the crown to argue the sufficiency of the 1st count. The offence charged in the 2nd count follows the precise terms of the act; the 1st section enacts that *from and after a day to be named in such proclamation* as there before described, the act shall apply to any county, county of a city, &c.; the 9th section enacts that from and after *the day* named in such proclamation, and thenceforth during all the time for which such proclamation shall be in force, it shall not be lawful for any person whomsoever, except those particularly named, to carry or have within the district specified in the proclamation, elsewhere than in his dwelling-house, any arms or ammunition, &c. Circumstances might happen in which it might be desirable to prevent parties carrying arms in the open streets, while they might be permitted, under certain restrictions, to have arms in their houses. It was the unlicensed carrying of arms in the open streets that the 9th section contemplated to restrain. If in addition it was deemed necessary to call in the arms, then a notice to surrender the arms before a given day to be named in such notice was to be given under the 11th section, and unless a license were obtained under the 9th section, or the arms were surrendered under the 11th section, the bare possession of arms, after the requisites of the statute had been complied with by the Executive Government, became an offence within the meaning and terms of the act. For the first offence, a proclamation was requisite; for the second offence, something further, namely, a notice to call in the arms. The 2nd count is framed on the 9th section, and does not therefore require any notice at all to constitute an offence against that section. [*Curran*.—The language of the 2nd count is, “after the 20th day of July, 1848, in the said notice mentioned,” and as this is the first time that there is any mention of a notice in the 2nd count, the words *said notice* must be taken to refer to the notice mentioned in the 1st count. *BALL, J.*—The introduction of the notice in the 2nd count is not a necessary ingredient to create the offence aimed at by the 2nd count. *BLACKBURN, C. J.*—The substance of that part of the 2nd count is merely to give the date of the proclamation.] The 1st section provides “that after a day to be named in such proclamation, the act shall apply to the county of a city;” not after a day upon which the proclamation should have been *posted*; the act is to take effect upon the day named in the proclamation. The 2nd section provides that printed

REG.  
v.  
OTWAY.  
—  
*Prevention of  
Outrage Act  
(Ireland.)*

Argument of  
Attorney-  
General for the  
Crown.



REG.  
v.  
OTWAY.  
—  
*Prevention of  
Outrage Act  
(Ireland.)*

The Attorney-  
General for the  
Crown.

copies of every proclamation issued under the act, shall be posted on or near to the doors of all places of public worship, and every police station and barrack within the district named in the proclamation, together with an abstract of the act for the information of all persons *affected* by the provisions of the act, in analogy to the ancient practice of requiring acts of Parliament to be read in churches and chapels, and at Quarter Sessions, for the information of those that might be affected by them. There is nothing in the 2nd section which renders a posting of the proclamation necessary to be proved in order to bring a party within the terms of the act which is put in force as against him by the mere issuing of the proclamation. The 9th section enacts that after *the* day named in such proclamation it shall not be lawful for any person whomsoever (unless excepted) to carry arms. This is the offence charged in the 2nd count of the indictment. If the Legislature intended that the posting of the proclamation on or near to the doors of all places of public worship, &c., should have been a necessary ingredient in creating an offence against the act, the statute would have been worded in this manner, viz., that after the day named in the proclamation, and *after the posting of the proclamation as therein before mentioned*, the offences against the statute should be created. [BALL, J.—The 2nd section, which enacts that the proclamation shall be posted in the manner therein directed, does not enact that the posting shall be had on or before a given day, and would seem therefore to be only directory.] The act was intended to affect only a certain class of persons, and the posting was introduced, not for the purpose of creating the offence, but for the purpose of giving notice to such persons of their liability to punishment after the issuing of the proclamation. If posting of the proclamation were a necessary ingredient in the offence, it should have been made before the day named in the proclamation for the act to take effect. Suppose an omission to post the proclamation should take place by reason of the death of the party employed to post it, between the day on which the posting should have taken place and the day of the act taking effect, no subsequent posting of the proclamation would be sufficient; therefore, if posting was an ingredient in the offence, it should have taken place before the day named for the act to take effect. [PERRIN, J.—Is not that the natural meaning and effect of the act? BALL, J.—If posting were a necessary ingredient in creating the offence, then there should be a day named on which the posting should have taken place. JACKSON, J.—The construction contended for on the part of the crown is, that after the publication of the proclamation, the day named in it is certified to all the world.] Suppose an act of Parliament were to direct that certain acts or omissions shall constitute an offence, if they take place on or before the 1st day of January, 1851, and that the act then went on to enact that the act itself should be read in all churches and chapels, the reading of the act would not be an essential ingredient to be averred in an indictment for an offence against the act. [JACKSON, J.—The class of

persons most likely to be affected by the act are those who never would hear of or see the *Dublin Gazette*. Is not publication by post, therefore, a reasonable precaution on the part of the Legislature?] The presumption of law is, that everybody is acquainted with the contents of an act of Parliament. [PERRIN, J.—Lord Tenterden has said, “God forbid that that should be the law.”] There is no direct authority to govern this case; the express point does not appear to have been even raised before; but, in all the cases of prosecutions and offences under the act, which have been instituted upon the several circuits in Ireland, there never was proof attempted to be given of posting in all places of public worship, &c., in the proclaimed counties, or districts of counties; and several cases have occurred of prosecutions for offences under the act, in the county of the city of Dublin, in which the parties pleaded guilty, and this point never was thought of. If a county at large be proclaimed, according to the argument of the prisoner’s counsel, it would be necessary to prove that every place of public worship, and every police station and barrack, within the county at large, had been posted. [BALL, J.—If the posting of the notice mentioned in the 11th section be a necessary ingredient to create the offence contemplated by the 12th section, will it not follow, from analogy, that the posting of the proclamation mentioned in the 2nd section would be a necessary ingredient to create the offence contemplated by the 9th section? DOHERTY, C. J.—No; for the posting of the notice is made a necessary ingredient in the constitution of the offence contemplated by the 12th section; but the posting of the proclamation is not made a necessary ingredient in the other case.] By the 21st section, the production of the printed copy of the *Dublin Gazette* is made conclusive evidence of all the preliminary requisites for the issuing of any proclamation, warrant, order, or notice, having been duly performed, and if this indictment were for the offence of having arms in the dwelling-house after the day named in the notice, this section would cure any defect with respect to the proof of the posting the notice. [BALL, J.—Does not the 21st section furnish a further argument? thus:—“In order to facilitate the proof of offences against it, the act provides a summary mode of proving the due *issuing* of the proclamation,” &c. If proof of the *posting* of the proclamation, &c., were necessary in order to constitute any of the offences, would not the act have gone on to facilitate the same difficult matter of the posting in the manner prescribed by the 2nd section?] It is objected that there is too much averred in the 2nd count of this indictment. The first count avers that, in pursuance of the act, a proclamation was issued by the Lord Lieutenant in Council, and that, by that proclamation, certain things were ordered; and then it avers that the Lord Lieutenant did, by notice published in the *Dublin Gazette*, require all arms to be surrendered on or before a day named in that notice. To sustain a prosecution upon this count, it might be necessary to prove the posting of the notice as well as the publication of it in the

REG.  
v.  
OTWAT.  
—  
*Prevention of  
Outrage Act  
(Ireland.)*

The Attorney-  
General for the  
Crown.

REG.  
v.  
OTWAY.  
—  
*Prevention of  
Outrage Act  
(Ireland.)*

The Attorney-  
General for the  
Crown.

*Dublin Gazette*, and if it were, I should be prepared to argue that the proof of the publication of that notice in the *Dublin Gazette* was sufficient; but the 2nd count of the indictment avers that on a given day the Lord Lieutenant, with the advice of the Privy Council, did, in pursuance of the act, "by a proclamation duly published in the *Dublin Gazette*, and then and there duly posted," with an abstract of the act at the foot, declare that from and after the 20th July, 1848, in the proclamation mentioned, the act should apply to the county of the city of Dublin; and it then avers, that after the said 20th day of July, 1848, in the said notice mentioned, and whilst the proclamation was in force, and the act applied to the county of the city of Dublin, the prisoner did carry arms and ammunition on his person contrary to the act. The averment of the publication and posting of the proclamation in this count is only a part of the description of the proclamation, and as it is not a material averment, it need not be strictly proved, it may be rejected as surplusage. The question in this case is, whether the provisions of the 2nd section of the act are directory, or whether they constitute an essential ingredient in the offence created by the 9th section; if they be not essential, they need neither be averred nor proved. In the case of *Samo and another v. The Queen* (2 Cox's C. C. 178), in error from the Queen's Bench, the 13th section of the act for establishing the Central Criminal Court (4 & 5 Will. 4, c. 36), which provides that no indictment for misdemeanor shall be presented to the grand jury under that act, unless the prosecutor be bound by recognizance to prosecute, or the accused be committed to or detained in custody, or bound by recognizance to appear, is only directory, and consequently the court under that act was held to have jurisdiction, although it did not appear on the indictment or record that any of those matters, so provided for by the 13th section, had been done. Parke, B. says, "the question is, whether the 13th section contains matters conditional, or which are only directory;" and again he says, "the court have not the least doubt that the 13th section of this act is only directory, and that the objection is one, therefore, which does not affect the jurisdiction of the Central Criminal Court." *Hill, assignee of White v. Heale & others* (2 Bos. & Pul. N. R. 196), was an action for money had and received by defendant, to the use of the plaintiff, as assignee of White, a bankrupt. The commission was sued out upon the affidavits of four petitioning creditors, whose debts did not appear, on the face of those affidavits, to amount to 200*l.*, and it was held that the commission was not void, the provision in the statute respecting such affidavits being directory only, and not conditional. As to the introduction of unnecessary averments, if anything be introduced unnecessarily it may be rejected: (*Rex v. Jones* 2 B. & Adol. 611). This was an indictment on the 9 Geo. 4, c. 41, s. 30. The 29th section directed that no person, not being a parish patient, should be received into any house for the reception of insane persons in England without a certificate, in

the manner required by the act. Sect. 30 provides that every certificate for the confinement of any person in such house should be signed by two medical practitioners, who should have separately visited and personally examined the patient. It then prescribes the several particulars to be stated in such certificate, and enacts that "any person who should *knowingly and with intention to deceive* sign any such certificate untruly setting forth any such particulars required by that act, should be deemed guilty of a misdemeanor." It then went on to provide that "any physician, surgeon or apothecary, who should sign or give any such certificate, without having visited and personally examined the individual to whom it related, should be deemed guilty of a misdemeanor." The indictment stated that the defendant, being a surgeon, did unlawfully, *knowingly, and with intention to deceive*, sign a certain certificate required by the act (which was particularly described in some of the counts), *without having visited and personally examined the individual* (not being a parish patient) to whom such certificate related, against the form of the statute, &c. The jury found the defendant guilty, but negatived any intention to deceive, and a special case was reserved for the opinion of the Court of Queen's Bench; the words "knowingly and with intention to deceive" are introduced in the first part of the section of the act relating to private persons, and are omitted in the latter part of that section relating to physicians, surgeons or apothecaries. Lord Tenterden, in his judgment (*ibid.* p. 614), says, "Is there anything for saying that if an indictment or a statute contains matter unnecessary to the description of the offence, if it charges the statutable offence, and something more, it is therefore not maintainable? In the absence of such authority this objection must fail." [BLACKBURN, C. J.—The case of *Williamson v. Allison* (2 East, 446, cited in Taylor on Evidence, 163, where the cases are collected, and commented upon), is a leading authority that surplusage need not be proved. That was a declaration in tort for breach of a warranty, that some claret was in a fit state to be exported to India, whereas it was at the time, and the defendant *well knew* it was, in a very unfit state. At the trial, no evidence was given of the defendant's knowledge, and the verdict being for the plaintiff, a motion was made for a new trial, on the ground that the *scienter* having been alleged ought to have been proved; but the court were unanimously of opinion that the allegation of the *scienter* was wholly unnecessary and immaterial, and therefore need not be proved.] *Minton's case* (2 East P. C. 1021), the indictment for setting fire to a barn, stated it to be in the night; but it was held that it was not material to be proved. In *Summer's case* (*ibid.* 785), where the indictment was for robbery near the highway, and it was proved to have taken place in an alehouse in Smithfield, the conviction was held right; so in *Wardle's case* (*ibid.*), where the indictment charged a robbery in a field near the highway, and the jury found the prisoner guilty of robbery, but not near the highway. The description of the offence contained in the 2nd count

REG.  
v.  
OTWAY.  
—  
*Prevention of  
Outrage Act  
(Ireland.)*

The Attorney-  
General for the  
Crown.

Rsg.  
v.  
OTWAY.

*Prevention of  
Outrage Act  
(Ireland.)*

Argument of  
Baldwin, Q. C.  
for the crown.

Curran in reply.

of this indictment, is only of an offence committed after a day named in the proclamation.

DOHERTY, C. J.—The act seems to contemplate one offence of having arms after the issuing of a proclamation, and another offence of having arms after the issuing of the proclamation, and a notice to call them in? Is there any reason for requiring proof of the posting of the notice in the latter case, more than the posting of the proclamation in the former?

Baldwin, Q. C. for the crown.—The reason for requiring proof of the posting of the notice in the latter case may be found in this, that to create the latter offence there must be a notice of the issuing of the proclamation, calling on all persons to surrender their arms on or before a day to be named in the notice, and at a place to be named therein; unless, therefore, this notice were posted, the parties to be affected might not know on what day, or at what place, the arms should be surrendered.

Curran, in reply.—It is clear that if this be the true construction of the act, the 2nd section has no use or value; the 11th section enacts that the notice to call in the arms shall be posted as before mentioned, that is, that the notice mentioned in the 11th section, and the proclamation mentioned in the 2nd section, should be posted alike; there is no mention whatever of the notice in the 2nd section. [BLACKBURNE, C. J.—The 9th and 11th sections describe what is to constitute the *corpus delicti* in each of two distinct cases, but a compliance with the terms of the 2nd section is not required by either the 9th or 11th sections; and an indictment following the terms of the act with respect to either offence is good, without averring the posting of the proclamation; it is only inferentially it could be sought to be required. JACKSON, J.—Mr. Curran's argument goes the length of holding that the provisions of the 2nd section pervade the other sections of the act.] The offence created under the 9th section merges in that created under the 12th section; so soon as the notice to call in the arms shall have been issued and posted under the 11th section, every offence against the 12th section comprised every offence against the 9th section, and something more. As to rejecting the averment of the posting of the proclamation and notice, if the notice of the averment can be rejected as surplusage it may be done, but part of an averment cannot be rejected, and part retained. The averment in both counts of this indictment is, "that by a proclamation duly published, and then and there duly posted," the act was put in force. I submit that this is one entire and material averment, and must be proved as laid; and that it is not a divisible averment, nor can it be rejected as surplusage, either in the whole, or in part.

December 10, 1849.

(Before the same JUDGES, at the same place.)

Judgment.

BLACKBURNE, C. J.—This case was reserved under the provi-

sions of the act of 11 & 12 Vict. c. 78, by the learned judges who presided at the last commission, and has been argued before us. The question arose on the trial of an indictment which contained two counts; the 1st count on the 12th section, and the 2nd count on the 9th section of the act of the 11 Vict. c. 2. The prisoner was convicted, and the question on which we are to decide is, whether the proclamation which issued and was published in the *Dublin Gazette*, pursuant to the 1st section of this act, should have been proved to have been posted in the manner prescribed by the 2nd section. As it was not contended before us that such proof had been made, and as the Attorney and Solicitor-General have rested the case, and maintain that the conviction has been right on the 2nd count, we are not called on to intimate any opinion except on the point to which the case was thus narrowed in the course of the argument, namely, whether it was necessary in support of the 2nd count to have proved a posting of copies of the proclamation with an abstract of the statute on the doors of all places of public worship, and of every police barrack in the proclaimed district. We are all of opinion that the 9th section did not make it necessary to aver more than that such a proclamation had issued and been published, as the 1st section of the act requires, in the *Dublin Gazette*, and therefore that the posting of the proclamation is not a fact that need be averred or proved in order to warrant this indictment and sustain the conviction under the 9th section for the offence of carrying or having arms elsewhere than in his dwelling-house by the party charged. But there arises another and a different question, thus: the 2nd count avers that the Lord-Lieutenant, by and with the advice of the Privy Council on the 20th July, 1848, did declare, by proclamation duly published in the *Dublin Gazette*, and then and there duly posted with an abstract of the act at the foot, according to the provisions of the statute, that from and after the said 20th July, the act should be in force in the county of the city of Dublin; it is contended by the prisoner's counsel, that even though this averment of the posting was not necessary, yet having been made it must be proved; on the other hand the Attorney and Solicitor-General contended that this averment of the posting of the proclamation not being necessary may be rejected as surplusage, and therefore that the conviction is good, though the posting was not proved. Though the words I have above transcribed from the indictment form consecutive and connected parts of the same sentence, they are really distinct assertions of distinct facts—one, that the proclamation was published in the *Gazette*, the other, that it was posted according to the provisions of the act. These are distinct, independent, and unconnected facts, that must happen in different ways, and by different means; and must, if material, be each established by distinct and independent proof. If the latter be detached from the former, there will still remain a complete sensible averment of the issuing of the proclamation, and its publication in the *Gazette*, which is all the act requires, to subject persons in the proclaimed district to its operation. This is

REG.  
v.  
OTWAY.

Prevention of  
Outrage Act  
(Ireland.)

Judgment.

REG.  
v.  
OTWAY.  
—  
*Prevention of  
Outrage Act  
(Ireland.)*

sufficient to show that this case comes within the rule which the authorities establish, that if an averment may be entirely omitted without affecting the charge against the prisoner, and without detriment to the indictment, it will be considered surplusage, and may be disregarded in evidence. This rule was acted on in the case of *The King v. Jones* (2 B. & Adol. 611); a case which, as an instance of its application, fully sustains our opinion that the averment of the posting of the proclamation was not necessary, and need not therefore have been proved. It is scarcely necessary to refer to the cases, of which *Bristow v. Wright* (2 Dougl. 665) is the leading one, in which it is held that, when the whole of an averment cannot be struck out without getting rid of an essential part, the whole must be proved; but, in addition to the reasons I have stated for holding the immaterial averment of the posting of the proclamation to be a distinct and independent one, I may remark, that it contains nothing which can, by any possibility, be understood to explain, qualify, or give particularity to the material and distinct averment of its publication in the *Dublin Gazette*. The point reserved is, therefore, ruled for the crown, the conviction on the 2nd count being, in our opinion, valid.

Judgment of  
Perrin, J.

PERRIN, J.—At first I thought there was some difficulty in this case in consequence of the two averments being connected with the word “and,” but I am satisfied that these are distinct, independent averments of independent facts, the one essential to the indictment, the other not so; and that the latter ought to be rejected as surplusage. In the case of *Voules v. Miller* (3 Taunt. 137), in an action upon the case, an averment that the plaintiff’s close, at the time of the injury was, and still is, in the occupation of J. V. and H. V., was held to have been sufficiently proved, if, at the time of the injury, it was in their occupation, though the tenant be since changed before action brought.

The following certificate was signed by Blackburne, C. J.:

WHEREAS at an adjournment of a Commission of Oyer and Terminer and General Gaol Delivery holden in and for the county of the city of Dublin, in the Sessions House in Green-street, in the said county of the city of Dublin, on Thursday the twenty-fifth day of October, one thousand eight hundred and forty-nine, and in the thirteenth year of the reign of our Sovereign Lady, Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, and so forth, before the Right Honourable Sir Timothy O’Brien, baronet, lord mayor of the said city of Dublin, the Honourable Philip Cecil Crampton, second justice of Her Majesty’s Court of Queen’s Bench in Ireland, and the Right Honourable Nicholas Ball, one of the justices of Her Majesty’s Court of Common Pleas, in Ireland, and other their fellows, justices and commissioners of our said Lady the Queen, in and for the whole county of the city of Dublin, assigned by letters patent of our said Lady the Queen, under the great seal of that part of the United Kingdom of Great Britain and Ireland, called Ireland: Samuel Otway, late of the parish of Saint James, was found guilty of two several misdemeanors charged

against him in two several counts of an indictment found against him at the said adjournment of the said Commission of Oyer and Terminer and General Gaol Delivery. And whereas the said justices and commissioners before whom the said Samuel Otway was tried, reserved a certain question of law arising upon the said trial for the consideration of the justices of either bench and the Barons of the Exchequer, in pursuance of the provisions of a certain act of Parliament made and passed in a session of Parliament held in the eleventh and twelfth year of the reign of our said Lady the Queen, entitled "An Act for the further Amendment of the Administration of the Criminal Law," and judgment upon the said indictment was thereupon respited in the meantime. These are therefore to certify that the said justices and barons having met at the Queen's Courts, Dublin, on Monday the tenth day of December, one thousand eight hundred and forty-nine; and the Right Honourable James Henry Monahan, Attorney-General for our said Lady the Queen, who, for our said Lady the Queen, prosecuted the said Samuel Otway in that behalf, appearing before the said justices and barons so met on the said last-mentioned day as aforesaid and counsel for the said Samuel Otway, also appearing, and the said James Henry Monahan, Attorney-General, as aforesaid, having given the said justices and barons so met as aforesaid, to understand and be informed that he the said James Henry Monahan, Attorney-General as aforesaid, did not mean further to proceed upon 1st count of the said indictment against the said Samuel Otway, or to demand any judgment thereupon; it was considered and adjudged by the said justices and barons, so met, that the said Samuel Otway was properly convicted and found guilty upon the 2nd count of the said indictment, and that judgment shall be given against the said Samuel Otway upon the said 2nd count of the said indictment at the adjournment of the Commission of Oyer and Terminer and General Gaol Delivery, now holding in and for the said county of the city of Dublin, at the Sessions House in Green-street, in the said county of the city of Dublin, before the said Sir Timothy O'Brien, baronet, lord mayor, as aforesaid, the Right Honourable Louis Perrin, third justice of Her Majesty's Court of Queen's Bench in Ireland, and the Right Honourable John Richards, third baron of Her Majesty's Court of Queen's Bench in Ireland.

Dated this 10th day of December, 1849.

F. BLACKBURNE,  
Presiding Chief Justice of the said  
justices and barons.

To the right honourable the justices and commissioners now presiding at the adjournment of the Commission of Oyer and Terminer and General Gaol Delivery, now holding for the county of the city of Dublin, and to the clerk of the crown of the county of the city of Dublin.

REG.  
v.  
OTWAY.  
—  
*Prevention of  
Outrage Act  
(Ireland.)*



## COURT OF CRIMINAL APPEAL.

*February 1, 1850.*

(Before WILDE, C. J., ALDERSON, B., WIGHTMAN, J., MAULE, J., and WILLIAMS, J.)

REG. v. JOHN CHRISTOPHER AND OTHERS.(a)

*Mode of taking depositions on charge of felony—Questions put by magistrate's clerk in absence of magistrate and prisoner—Admissibility of parol evidence of the answers given to such questions—Opportunity for cross-examination—Stat. 11 & 12 Vict. c. 42, s. 17.*

*Upon the trial of an indictment for felony, a witness for the prosecution was asked by the prisoner's counsel whether he did not make a certain statement to the magistrate's clerk in answer to a question put by him in the absence of the magistrate and of the prisoner, whilst he (the clerk) was writing out the depositions from the minutes of the examination and cross-examination which had been previously taken before the magistrate, and put for the purpose of making the depositions more complete. The depositions, when written, were afterwards read over to the witnesses, and in the presence of the magistrate and the prisoner, to whom opportunity of cross-examining them was again afforded, the witnesses swore that they were true, and signed them.*

*Held, that even if the depositions so taken had, when resworn, the legal character of depositions, the prisoner's counsel was entitled to ask the above question without putting them in, and the witness was bound to answer it; but*

*Semble—That the documents prepared by the magistrate's clerk in the manner above described had not the legal character of depositions.*

THE following case was stated by the Recorder of Liverpool, for the opinion of the judges, under stat. 11 & 12 Vict. c. 78.

The prisoners, John Christopher, John Smith, and George Thornton, were indicted at the General Quarter Sessions, holden in and for the borough of Liverpool, on the 22nd day of October, 1849, for felony.

Case.

When the prisoners were first brought before the magistrate, and charged with the felony, the witnesses were sworn, examined by the magistrate and cross-examined by the prisoners, and written minutes of the examination and cross-examination were made by the clerk of the magistrate under the inspection of the magistrate.

These minutes were then sent to the office of the clerk of the

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

magistrate, and there delivered to a clerk named Tasker, who proceeded to write the depositions from the minutes. The witnesses attended in the office, and in the course of writing the depositions Tasker put some questions to each of them for the purpose of rendering the depositions more correct, clear and complete. The answers given to these questions were inserted in the depositions. The magistrate was not present, nor were the prisoners, at the office of the clerk to the magistrate.

REG.  
v.  
CHRISTOPHER  
AND  
OTHERS.  
—  
*Evidence—  
Depositions.*

The depositions having been thus written, the witnesses appeared again before the magistrate, and in the presence of the prisoners were resworn; the depositions were read over to them, and a full opportunity was afforded for cross-examination before the depositions were signed by the witnesses.

Under these circumstances appearing on the trial, the counsel for the prisoners proposed to ask one of the witnesses for the crown the following question—"Did you not tell Mr. Tasker that you were watching the prisoner Christopher till a quarter before one o'clock?" This question was material.

Case.

The question had reference to what was said by the witness in answer to some question put by Mr. Tasker, as above stated, in the course of writing the depositions, and the witness's answer would, according to the evidence, appear on the depositions.

The depositions were not read or tendered in evidence.

The counsel for the prosecution objected to the question proposed, and the question was overruled by the court.

The prisoners were all convicted of felony.

Judgment was postponed, and the prisoners were committed to prison until it should have been considered and decided whether the question proposed to be asked was properly overruled, and whether the prisoners were duly convicted.

*Hills*, for the prisoners.—The question put to the witness ought to have been allowed whether the depositions were properly taken or not; but first, they were not properly taken. They were not, in point of law, depositions at all, so as to exclude parol evidence of what the witnesses said. The objection to them is, that they were taken in the absence of the prisoner, which is contrary both to the common law and the statute law. Even before the statutes of 2 & 3 Phil. & M. c. 10, and 7 Geo. 4, c. 64, required the examination to be taken in writing, the person charged was, upon general principles, always allowed the opportunity of cross-examining the witnesses produced against him. Since it has been necessary to reduce the examinations into writing, it has been held sufficient if the prisoner had the opportunity of cross-examining the witnesses at the time of reading over to them the whole of their depositions. Thus, in *R. v. Chas. Smith* (Russ. & Ry. 339), the depositions were not wholly taken in the prisoner's presence, but the witness afterwards, in his presence, was resworn, and the depositions repeated and signed, and the judges held that they were admissible, because the prisoner had an opportunity of cross-examining them when they were resworn; but some doubt

Argument of  
*Hills* for the  
prisoners.

REG.  
v.  
CHRISTOPHER  
AND  
OTHERS.  
—  
*Evidence—  
Depositions.*

is thrown upon that decision by a recent case of *R. v. Johnson* (2 Car. & K. 394), in which Platt, B. held, that the witnesses who make the depositions on which a prisoner is committed upon a charge of felony should be examined in the prisoner's presence, and that he ought to hear all the questions put and answered; and that, consequently, if the magistrate's clerk, before the arrival of the magistrates and the prisoner, examines the witnesses and takes down what they state, and when the magistrates and prisoner arrive, the depositions so taken are read over to the witnesses in the presence of the magistrates and the prisoner, and the latter is asked whether he has any question to put to them, such depositions are illegally taken.

ALDERSON, B.—The case of *R. v. C. Smith* was tried by Richards, C. B., at Newcastle. I had a note of a case before Chambre, J., at variance with the decision of the Chief Baron. I overtook him at Carlisle, and showed him the note. He delayed execution, and the question was considered by all the judges, who were of opinion that the ruling of Chambre, J. could not be sustained. That being so, the case of *R. v. Johnson* cannot be upheld, though I am far from saying that there is not a good deal in the observations of Platt, B. in that case.

*Hills.*—The recent act (11 & 12 Vict. c. 42, s. 17,) requires that the statement of the witness be taken on oath or affirmation, in the presence of the prisoner, and put into writing.

WILDE, C. J.—It would seem from the words of the act that the prisoner ought to have an opportunity of comparing the written statement with the verbal statement, which he cannot have if the verbal statement was not made in his presence.

*Hills.*—Sect. 17 is very explicit. Not only does it say that the magistrate "shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same;" but it provides that if, upon the trial of the person so accused, it shall be proved that any person whose deposition has been taken is dead, or so ill as not to be able to travel, "and if, also, it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness," then, if it purport to be signed by the justice, it may be read as evidence. In this case the original minutes formed the only deposition taken in the presence of the prisoner, and they were not signed as the statute requires. The mere form of reswearing the witnesses does not remove the difficulty, because the attorney or counsel may have gone away, naturally imagining that the examination was over, and the prisoner might well presume that no addition had been made. Yet, if the witnesses were to die, or be unable to attend

from illness, the deposition would, under the act, be evidence against the prisoner.

MAULE, J.—The statute makes their admissibility depend upon the prisoner having had “a full opportunity of cross-examining.” It can hardly be said that he had a full opportunity if he did not hear the questions as well as the answers, for the answer may be in the affirmative of a question that propounds alternatives, and the prisoner and his accuser may differ as to which alternative is affirmed.

*Hills.*—If this practice be permitted, the clerk may take the depositions in the very words of an act of Parliament, and so make complete that which was doubtful or ambiguous.

MAULE, J.—Some clerks do seem to think that depositions are not depositions unless they have the words “then and there,” or other similar phrases which they deem operative—that is, that they are not depositions unless, also, they are not the language of the witnesses.

*Hills.*—Secondly, even assuming that the depositions were sufficiently taken to render them admissible in evidence, it by no means follows that the question put to the witness ought not to have been answered. The depositions profess only to contain the statements made before the magistrate, and the question asked related to a statement made, not before the magistrate, but to the magistrate’s clerk in the magistrate’s absence. Upon what principle can parol evidence of that statement be excluded?

ALDERSON, B.—What was said to Tasker is not to be excluded because it was also said before the magistrates. Tasker was not a judicial officer, and no one was bound by what he wrote.

*Paget*, *contra*, was directed to confine himself, in the first instance, to the last point.

ALDERSON, B.—Suppose the depositions to be perfect, and that the answer would appear upon them; still, cannot the prisoner ask the witness what he said, not before the magistrate when the depositions were being taken, but at some other time?

*Paget*.—The finding of the case is conclusive as to that. It is found that “the question had reference to what was said by the witness in answer to some question put by Mr. Tasker, as above stated, in the course of writing the depositions, and the witness’s answer would, according to the evidence, appear on the depositions.” If that be so, the depositions are the proper evidence.

ALDERSON, B.—There is the fallacy. The depositions contain that which Tasker wrote, and that which the witness afterwards stated to be true. They may contain the true answer to the question, “What did the witness say to Tasker?” but the witness might say that he had given a different answer to Tasker from that which the deposition contained.

WILDE, C. J.—When the witnesses are resworn the questions and answers are not repeated; the witnesses are only asked generally, whether the deposition is true.

MAULE, J.—It is possible that a witness may have requested

REG.  
v.  
CHRISTOPHER  
AND  
OTHERS.  
—  
*Evidence—  
Depositions.*

Argument of  
*Paget* for the  
prisoners.

REG.  
v.  
CHRISTOPHER  
AND  
OTHERS.  
—  
Evidence—  
Depositions.

Tasker to take down a particular statement, and that Tasker refused, because he did not think it material, and that it was material; you would not say that if Tasker was a mere stranger, his written account of what the witness had said should exclude that material statement; yet he certainly was not a judicial officer.

*Paget.*—This statement has been read over to the witness, and signed by him as and for the true account. If the witness had employed Tasker to write his statement, had seen it when written, had signed it and transmitted it to a third party, the witness could not have been asked a question about any statement in that paper until the paper had been put into his hands: (*The Queen's case*, 2 B. & B. 289.)

ALDERSON, B.—That was the case of a letter, and it did not appear that the writer had made any statement except in writing. In this case there was an oral statement previously to the writing; could it not have been given in evidence if it had never been written down?

MAULE, J.—Take the case of an affidavit dictated to an attorney; may not the maker of the affidavit be asked, did you not, whilst dictating, say so and so?

*Paget.*—Not if the answer is in the affidavit. In *Sainthill v. Bound* (4 Esp. 74), it was decided by Lord Kenyon that a witness could not be cross-examined as to what he had sworn in an affidavit, unless the affidavit was produced.

Argument of  
*Paget* for the  
prisoners.

MAULE, J.—There the inquiry was into the contents of the affidavit; here the inquiry is not into the contents of the deposition, but into the fact whether certain words were spoken. The production of the statement written subsequently may show what he afterwards acknowledged to be the truth of the matter, but not that he spoke the very words there written.

*Paget.*—For this part of the case the depositions are assumed to be correctly taken under the authority of the magistrate; and the presumption therefore is, that they contain all that was material in the testimony of the witnesses. That being so, they ought to be produced before any question can be asked as to what the witnesses said. In *Leach v. Simpson* (5 Mee. & W. 312), Parke, B., said, "The presumption is, until the contrary is shown, that the magistrate took down all that was material in the testimony of the witness. The written deposition, therefore, is the best evidence of what he said, and must first be produced before you can inquire by other means as to what passed on the occasion; then, if it appear on production of the deposition that any particular statement alleged to have been made is not contained in it, you may add to it by parol evidence of that statement." If a merchant were to dictate a letter to a clerk, to sign it, and to send it, he could not be asked what he had dictated unless the letter were first put in.

MAULE, J.—Mr. Tasker was not a subordinate writing at the dictation of the witness, but a person assuming to have authority to write down what the witness said.

ALDERSON, B.—In such a case it is the communication that is

the evidence; the letter is the communication, and therefore the letter must be put in; but in cases in which the declaration is the evidence, and the declaration was by words spoken, the words spoken must be proved, though they were written down after they were spoken. This matter is correctly and ably treated in a note to *Jeans v. Wheedon* (2 M. & R. 487.) (a)

*Paget.*—In that case the document was not signed, and therefore no deposition. As to the first point—(He was stopped.)

*WILDE, C. J.*—It is unnecessary to hear any further argument on the first point, because we are all of opinion that the question, the right to put which is raised by the second point, ought to have been allowed, and that an answer to it ought to have been required. The question was, "Did you not tell Mr. Tasker that you were watching the prisoner Christopher till a quarter before one o'clock?" The objection was that the answer to the question was to be found in a paper written by Tasker immediately after the supposed statement to Tasker took place, and afterwards signed by the witness. Was that paper the primary evidence of what the witness had told Tasker? It is said that it was so because it ought to be treated as a deposition before a magistrate—a character which it only acquired after the statement was made. That there was an interval between the writing of the paper and its acquiring that character will not very much vary the matter: is, then, the analogy correct? We think not. The authority of a deposition is derived from the fact that the law has charged the magistrate with the duty of recording what the witness has said. The law presumes that he will do his duty; and, therefore, that which he so does becomes the best evidence.

REG.  
V.  
CHRISTOPHER  
AND  
OTHERS.  
—  
Evidence—  
Depositions.

Judgment.

(a) The marginal note of *Jeans v. Wheedon* is as follows:—"Where, on a preliminary hearing of a case, the magistrate's clerk had taken down what a witness said, but neither witness nor magistrate signed it: held, that what the witness said might be proved by any one who heard him, without producing the clerk's note;" and the following passage is extracted from the note referred to by Baron Alderson:—"The statutes 1 & 2 Phil. & M., and 7 Geo. 4, c. 64, require the examinations of witnesses and prisoners to be reduced into writing, and parol evidence of what either of them said *when under examination* cannot be received in the first instance on the criminal trial, preliminary to which the examination was taken. But even on such criminal trial evidence is admissible by way of explanation or to prove that the party made other statements besides those reduced into writing; otherwise the safety of prisoners and the credit of witnesses would depend on the honesty and accuracy of the clerks who take the examinations: and instances (not occurring on such criminal trial,) may perhaps arise in which what a witness said before a magistrate might be given in evidence against him without even producing the written examination; but see *Leach v. Simpson* (5 M. & W. 309, *contra*); at all events, it may be added to or explained, and that even by showing other things said, pertinent to and part of the matters for which the examination was taken: (*Venafra v. Johnson*, 1 Moo. & Rob. 316.) In the principal case it was not perhaps necessary that the statements, parol evidence of which was objected to (*viz.*, statements made by the defendant on the first occasion of his going before the magistrate), should have been reduced to writing at all; but even if the entire examination of the witnesses, and the committal of a prisoner, take place at the same time, it would seem most inconvenient, as well as unreasonable, to make the written examination conclusive as to all the preliminary statements of the witnesses on which it was founded. In practice, the witnesses are allowed to tell their stories their own way, and what the magistrates and their clerks consider to be the effect is written down and then read over (it is true) to the examinant; but it is scarcely to be expected that he should be very exact in observing inaccuracies. To this it may be added that matters may have been stated which were reasonably omitted from the written examination, in consequence of their appearing at the time insignificant, though their connection with them, subsequently brought to light, may have rendered them of the utmost importance."

REG.  
v.  
CHRISTOPHER  
AND  
OTHERS.  
—  
*Evidence—  
Depositions.*

Had this paper prepared by Tasker any analogy to the deposition which it afterwards became? Was there in the paper at the time it was written any legal character, the effect of which was to exclude parol evidence of what was in fact said? The court thinks that there was not. At the time Mr. Tasker wrote he was doing an act to which the law gave no sanction, and, therefore, doing it as a mere volunteer between himself and the witness. The primary evidence was what the witness said, and what he said cannot be excluded because another man committed it to writing. The argument cannot be put higher than if the witness had himself put his own words into writing as he uttered them, and in such a case it could not be contended that the witness could not be asked what he had said. The argument in support of the objection, then, points to an analogy having no foundation. The law has, in this case, no security that what the witness said at the time to which the question is confined was committed to writing; we are, therefore, of opinion that the question was improperly overruled, that the conviction cannot be sustained, and that a verdict of not guilty ought to be entered.

*Conviction reversed.*

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## MIDLAND CIRCUIT.

LINCOLNSHIRE SUMMER ASSIZES, 1849.

*Lincoln, July 16.*

(Before Mr. Justice COLERIDGE.)

REG. v. JANSON. (a)

*Larceny—Pretended hiring—Actual conversion—Sale.*

*If goods are delivered to a person on hire, and he takes them away, animo furandi, he is guilty of larceny, although no actual conversion of them by sale or otherwise is proved.*

*R. v. Brooks, 8 Car. & P., 295, overruled.*

*A. hired a horse and gig with the felonious intention of converting them to his own use, and afterwards offered them for sale, but no sale took place.*

*Held, nevertheless, that he was guilty of larceny.*

THE prisoner was tried upon an indictment which charged him with stealing a horse and gig of the prosecutor. It was proved that the prosecutor was a publican, and that the prisoner came to him and hired a horse and gig under the pretence of going to Sheffield. Instead, however, of going to Sheffield, he took

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

them in a contrary direction to Worksop, and thence to Manchester. At the latter place he offered them for sale, but no sale took place, and the prisoner was shortly afterwards apprehended. At the close of the case for the prosecution, Sir E. Wilmot, *amicus curiæ*, suggested that, upon the facts as proved, the prisoner was entitled to an acquittal, upon the authority of the decision of Tindal, C. J., in *R. v. Brooks* (8 Car. & P. 295), where it was held that in order to constitute a larceny by a party to whom goods have been delivered on hire, there must be not only an original intention to convert them to his own use, but a subsequent actual conversion, and that a mere agreement by the hirer to accept a sum offered for the goods by a third party, who, however, did not intend to purchase unless his suspicions as to the honesty and right of the vendor to sell were removed, did not amount to such a conversion.

REG.  
v.  
JANSON.  
—  
Larceny.

*Flowers*, for the prosecution.—The taking away of the goods, under circumstances which show that there was no intention of returning them, is a sufficient conversion. In *Temple's case* (1 Leach, 420; 2 East P. C. 691), the not returning of the post-chaise was the only evidence of the conversion.

COLERIDGE, J. (after consulting PARKE, B.), said, my brother Parke agrees with me, that the facts proved are sufficient to support a charge of larceny. If *R. v. Brooks* is correctly reported, we cannot assent to the doctrine there laid down.

*The prisoner was found guilty, and sentenced to twelve months' imprisonment.*



## COURT OF CRIMINAL APPEAL.

January 19, 1850.

(Before WILDE, C. J., ALDERSON, B., WIGHTMAN, J.,  
PLATT, B., and V. WILLIAMS, J.)

REG. v. RICHARD CLUDERAY. (a)

*7 Will. 4, & 1 Vict. c. 85, s. 2.—Administration of poison in a manner which renders it innocuous—Intention to kill.**A person who administers poison with intent to kill, is guilty of felony under section 2 of 7 Will. 4 & 1 Vict. c. 85, although, through ignorance or by mistake, he administers it in a form which renders it innocuous.**The prisoner, with intent to kill, administered to a child nine weeks old, two cocculus indicus berries. That berry is classed with narcotic poisons; but the poisonous property resides in the kernel, which is inclosed in a pod so hard, that it could not be digested by a child of that age. Therefore the pod rendered the poison innocuous.**Held, nevertheless, that he was properly convicted under the above section.*

AT the Winter Gaol Delivery for the county of York, A.D. 1849, the following case was reserved for the opinion of the court constituted under the 11 & 12 Vict. c. 78, by Williams, J.:—

Case.

“This was an indictment under the 7 Will. 4 & 1 Vict. c. 85, s. 2, for administering poison with intent to murder. The prisoner was proved to have administered to Ruth Horsfield, a child of nine weeks old, two *cocculus indicus* berries. The child, after having swallowed the berries, threw up one by vomiting, and the other passed through her body in the course of nature, and was found next day in her clothes. Two medical witnesses, called on the part of the prosecution, proved that the *cocculus indicus* berry was classed with the narcotic poisons; that the poison consists in the presence of an alkaloid which is extracted from the kernel; that all the noxious properties are in the kernel; that it has a very hard exterior or pod, to break which much force is required: one of these witnesses added, that the berry, if the pod is broken, is calculated to produce death in an adult human subject, though he did not prove how many would be required for the purpose;

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

that he thought the poison contained in the kernel of two berries, if the pods were burst, and if retained in the stomach, might produce death in a child of nine weeks old, but that the berry could not be digested by the child, and that it would pass through its body without the pod being burst, and so would be innocuous (as had in fact happened in the present case.) It was therefore objected, by the counsel for the prisoner, that the berries were not poison within the meaning of the statute, for that, though the kernel of the berries contained poison, yet the pod rendered the poison innocuous. I overruled the objection, and left the whole case to the jury, who found the prisoner guilty, and I directed judgment of death to be recorded. But I stayed the execution, in order to submit the point raised by the prisoner's counsel to the consideration of this court."

REG.  
v.  
CLUDERAY.  
—  
*Administering  
poison with  
intent, &c.*

*Overend*, for the prisoner.—This indictment is founded upon 7 Will. 4 & 1 Vict. c. 85, s. 2, which enacts that "whosoever shall administer to, or cause to be taken by, *any person any poison or other destructive thing*, with intent to commit murder, shall be guilty of felony," &c. Now that which the prisoner administered was not a poison or destructive thing; for it was administered in a form which prevented it from being destructive. The poison could not come into contact with the body of the person who took it. The words "or other destructive thing," show that, to constitute an offence under the section, something must be administered which could destroy. It is proved in this case, that the thing administered could not destroy. In sect. 6, which provides for the offence of attempting to procure abortion, the words used are "any poison or other *noxious* thing," which might be capable of a different construction. [WILDE, C. J.—According to your argument, people may be allowed to speculate on the strength of the dose which they give. They may administer arsenic, if they only give too small a dose to kill. WILLIAMS, J.—The question is, was poison administered; if it was, the quantity is immaterial; if poison was not administered, then the intention is immaterial.] In *Reg. v. John Haydon* (1 Cox C. C. 184), the prisoner was indicted for administering spirits of hartshorn, "well knowing the said spirits to be a deadly poison;" and it was objected for the prisoner, that spirits of hartshorn could not be considered a *deadly poison*, as it was largely used as a medicine, and only destructive if taken in excess; but Erle, J. said, "The word *deadly* appears to me to be used merely in pursuance of an ancient form, and not to be essential to the validity of the indictment. It would be sufficient to describe it simply as a poison, and under that term would fall anything calculated to destroy life. Substances harmless in themselves, might become poisons by the time or manner of their administration." The prisoner was acquitted, and the present is the converse of that case. This was a poison, administered in such a manner as not to be destructive to life. It is as though the poison and the antidote were administered together.

Argument of  
*Overend* for the  
prisoner.

WIGHTMAN, J.—The real question is, whether the kernel is

REG.  
v.  
CLUDERAY.  
—  
*Administering  
poison with  
intent, &c.*

poison whilst it is in the pod? If it is not, then of course this is a much weaker case than that of *Reg. v. Haydon*; but if it is, it is very much stronger than that; because it was doubtful there whether the spirits of hartshorn was *poison* at all.

*R. Hall*, for the prosecution.—If the thing administered is poisonous at all, the guilt or innocence of the accused depends upon the intent with which it is administered, not upon the strength of stomach which the person to whom it is administered may possess. Suppose arsenic was administered in a glass capsule, can it be said that the guilt or innocence of the prisoner would depend upon the strength of the glass? That, although he intended it to burst, still if it could be shown that the strength of the glass was such that bursting was impossible, he could not be convicted under this statute? [WILDE, C. J.—It might as well be said that the administration of a quantity so small or so large as not to be destructive would not be a felonious administration of poison.] The offence consists in the administration of a poison with intent to destroy life; and that offence has, in this case, been completely proved. The consequences of the administration are altogether out of the question; as far as the guilt of the prisoner is concerned, it matters not in the least whether any injury was done.

*Overend*, in reply.

Judgment.

WILDE, C. J.—The real question has been rightly stated,—did the prisoner administer poison with intent to commit murder? Now the facts are these. The kernel of the berry is unquestionably poison; and the jury have found that it was administered by the prisoner with intent to kill. But the question arises in consequence of the form in which it was administered—it appearing that the pod in which the kernel was contained was so hard that it necessarily prevented the kernel from operating as a poison. We, however, are all of opinion that the prisoner's mistake in that respect does not remove his guilt: if a person administers that which is poison, intending it should kill the person who takes it, he is guilty under the statute in question, although, by ignorance or mistake, he happens to administer it in a form which renders it innocuous.

ALDERSON, B.—This is very different from the case of a man administering something which he erroneously supposes to be poison.

WIGHTMAN, J., PLATT, B., and V. WILLIAMS, J., concurring.  
*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*February 1, 1850.*(Before WILDE, C. J., ALDERSON, B., MAULE, J., WIGHTMAN, J.,  
and WILLIAMS, J.)

REG. v. WILLIAMS. (a)

*Church rates—Warrant of distress—Form of—Limitation of time for  
sale of goods.**Stats. 53 Geo. 3, c. 127, s. 7 ; 27 Geo. 2, c. 20, ss. 1, 3.**The 27 Geo. 2, c. 20, s. 1, applies to all warrants of distress for levying  
money ordered to be paid by any act of Parliament authorizing such  
distress, excepting those issued against Quakers ; therefore a warrant  
of a justice under the 53 Geo. 3, c. 127, s. 7, for levying by distress  
and sale a sum of money ordered to be paid by two justices in respect  
of a church rate, ought not, except in the case of Quakers, to direct a  
sale "forthwith," but to impose the limitations prescribed by the  
27 Geo. 2, c. 20, s. 1, of a time certain not less than four days, nor  
more than eight days.*

THE prisoner was tried at the General Quarter Sessions for the county of Cornwall, held at Bodmin, on the 17th of October, 1849, on an indictment for unlawfully rescuing a distress for church rates. The 1st count recited the making a complaint <sup>Case.</sup> before a justice by the churchwardens of the parish of St. Austell, in the said county, that the prisoner, Richard Williams, had refused and neglected to pay the sum of 8s. 8½d., church rates, which he was duly rated and assessed to pay in the said parish ; the making an order by the said justice, requiring the prisoner to pay the said sum, together with the sum of 5s. 9d. for costs ; the refusal and neglect of the prisoner, Richard Williams, to obey the said order and pay the sum ordered to be paid, and then the issuing a warrant of distress, the concluding part of which was as follows : —“ These are, therefore, to authorize and command you, that you do forthwith levy the aforesaid sum of 14s. 5½d. by the distress and sale of the goods and chattels of the said Richard Williams, and out of the money arising from such sale, that you do pay or cause to be paid unto the said Richard Parson and William Jago (the churchwardens) the said sum of 14s. 5½d., and thereout also deduct your necessary charges for distraining ; and if any surplus shall remain after such payment and deduction as aforesaid, that you do render the same unto the said Richard Williams.” The 2nd count of the indictment, the *only* one now material, was as

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

REG.  
v.  
WILLIAMS.  
—  
Church Rate—  
Warrant of  
Distress.

follows:—"And the jurors aforesaid, upon their oath aforesaid, do further present, that after the taking and distraining of the said goods and chattels in manner and for the cause aforesaid, and whilst the said sum of 14s. 5½d. remained due and unpaid, to wit, on the day and year last aforesaid, at the parish of, &c., the said goods and chattels were then and there in the custody and possession of one Samuel Treverton, under and by virtue of the said warrant, and by him were then and there had and detained for the cause aforesaid, he, the said Samuel Treverton then and there being one of the constables of the said parish, &c., and that the said Richard Williams, on, &c., with force and arms at the parish, &c., the goods and chattels so as aforesaid, in the custody of the said Samuel Treverton, as such constable as aforesaid, then and there being, from and out of the custody and against the will of him, Samuel Treverton, then and there unlawfully and injuriously did rescue, take, and carry away (the said sum of 14s. 5½d. so as aforesaid due, being then unpaid) and other wrongs, &c., against the peace, &c.

The counsel for the prisoner took an objection to the validity of the warrant, on the ground that a time had not been therein limited by the justices for the sale and disposal of the goods, as required by the 27 Geo. 2, c. 20, s. 1. The objection was overruled, and the prisoner having been found guilty on the 2nd count, was sentenced to be imprisoned for two months, and to pay a fine of 10*l*., subject to a case reserved for the consideration of the court.

No counsel was instructed on behalf of the prisoner.

Argument of  
Pashley for the  
crown.

*Pashley* for the crown.—The conviction certainly cannot be supported if the warrant is bad, and the question is, whether it is bad for directing a sale of the goods forthwith instead of at the expiration of four days, according to the limitation imposed by the 27 Geo. 2, c. 20, s. 1, "An Act for the more easy and effectual proceeding upon Distresses to be made by Warrants of Justices of the Peace," the first section of which requires that justices shall, in their warrant, order and direct the goods and chattels so to be distrained to be sold and disposed of within a certain time to be limited in such warrant, so as such time be not less than four days nor more than eight days, unless the penalty or sum of money for which such distress shall be made, together with the reasonable charges, &c., be sooner paid. [WILLIAMS, J.—That provision applies in all cases where any justice or justices of the peace is, or are, or shall be, required or empowered by any act or acts of Parliament now in force or hereafter to be made, to issue a warrant of distress for the levying of any penalty inflicted, or any sum of money directed to be paid by, or in consequence of, any such act or acts. Is not this such a case?] The 3rd section of that act contains an express exception of warrants of distress issued for the recovery of tithes and church rates from Quakers; so that the provisions of the 7 & 8 Will. 3, c. 34, and 1 Geo. 1, c. 6, s. 2, are not affected by the 27 Geo. 2, c. 20, s. 1. But the warrant in this

case was issued under the 53 Geo. 3, c. 127, s. 7, and the argument is that the 27 Geo. 2, c. 20, is to be considered as imported into that subsequent statute. Now the effect of 53 Geo. 3, c. 127, s. 7, is to extend to all persons the provisions for the recovery of church rates, which were before that time applicable to Quakers only, if the sum to be recovered does not exceed 10*l*. That statute itself imposes no limitation of time upon the sale of the goods, and the inference from the exception contained in sect. 3 of 27 Geo. 2, c. 20, seems to be this, that that limitation was not intended to apply to the cases in which a civil remedy was substituted for the old remedy provided by the ecclesiastical law for the recovery of church rates. [MAULE, J.—The 27 Geo. 2, c. 20, prescribed the mode of exercising the authority in every case in which the authority then existed or should thereafter exist. “Distress” is not the appropriate term, for the process is not the seizing of a pledge, but the levying in execution as by writ of *feri facias*.] The 27 Geo. 2, c. 20, s. 1, prescribes the mode in all cases not within the 3rd section; but, as the 3rd section excepts all cases under the statutes of Will. 3 & Geo. 1, and the effect of 53 Geo. 3, c. 127, is only to extend the provisions of those statutes to persons to whom they formerly were not applicable, it is submitted that proceedings under 53 Geo. 3, c. 127, are within the exception, as well as proceedings under the 7 & 8 Will. 3, & 1 Geo. 1; all statutes in *pari materiâ* ought to be read together. [MAULE, J.—But these are not in *pari materiâ*. Under the 53 Geo. 3, the church rate is the *materiâ*; under section 3 of the 27 Geo. 2, c. 20, the Quaker is the *materiâ*, and as it is known that Quakers will not pay church rates, it is most humane to proceed at once, and without causing the useless expense of keeping a man in possession four days. WILLIAMS, J.—The express exceptions in the 27 Geo. 2, c. 20, s. 3, assumes that, but for that exception, the general words of the 1st section would have applied to the case of “Quakers.” MAULE, J.—The ecclesiastical duty of paying church rates may now be enforced by civil process under the 53 Geo. 3, just as by the statutes of Henry 8 a civil remedy was introduced against the evils of heresy which theretofore could only have been restrained by the spiritual arm. The civil process then gets an authority from the 53 Geo. 3, which it otherwise would not have; in either words the sum of money is directed to be paid in consequence of an act of Parliament.”] The smallness of the sums payable for church rates renders it improbable that the Legislature intended the 27 Geo. 2, c. 20, s. 1, to apply; and though the introduction of sect. 3 seems to show that in the opinion of the Legislature the statute with that section would have applied even to the case of Quakers, such an exception is not to be treated as a declaration or enactment, for it is the province of the judge and not of the Legislature, to construe acts of Parliament: (*Dore v. Gray*, 2 T. R. 358, 365.) The form of the warrant is the usual one, and is to be found in Burn’s Justice, “Churchwarden,” vol. 1, p. 698, Chit Ed

REG.  
v.  
WILLIAMS.  
—  
Church Rate—  
Warrant of  
Distress.

REG.  
v.  
WILLIAMS.  
—  
*Church Rate—  
Warrant of  
Distress.*

ALDERSON, B.—It cannot be doubted that the 27 Geo. 2, c. 20, s. 1, would have applied to the case of Quakers but for the 3rd section. Justices make an order which they are only empowered to make by an act of Parliament; the order directs sale *forthwith*; the 27 Geo. 2, imposes a limit of time, when the order is made in consequence of an act of Parliament; the case only requires to be stated.

MAULE, J.—This is not the first form in them that has been held bad.

ALDERSON, B.—The form ought to be *burned*.

WILDE, C. J.—We are of opinion that this warrant is within the operation of the 27 Geo. 2, c. 20, s. 1, and is, therefore, bad for not limiting the time of sale. Consequently a verdict of not guilty must be entered.

*Conviction reversed.*

## OXFORD CIRCUIT.

GLOUCESTERSHIRE SUMMER ASSIZES, 1849.

*August 9.*

REG. v. JAMES. (a)

(Before Mr. Justice ERLE.)

### *Forgery—Evidence.*

*Where a prisoner utters an instrument with a forged indorsement or other writing, and a short time previously the instrument is shown to have been in his possession without such indorsement, &c., there is some evidence of forgery, although there be no proof of the indorsement being in the prisoner's handwriting, or it be even shown that he is unable to write.*

THE prisoner, Obadiah James, aged twenty-one, was indicted for forging, at Bristol, the indorsement of a bank post bill for the sum of 10*l*., with intent to defraud William Down. In another count of the indictment the prisoner was charged with uttering the same bill, knowing the indorsement to be forged. There were other counts in the indictment, varying the intent. It appeared in evidence that Mrs. Mary Ann Clarke, the wife of Mr. John Stanley Clarke, residing at Bath, went out walking on the afternoon of the 13th of March, having in her purse a 10*l*. bank post bill, payable to herself, and unindorsed by her. During her walk, she lost her purse and the bill. About six o'clock on the

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

evening of the same day, the prisoner went to the shop of Mr. William Down, a linen draper at Clifton, about twelve miles from Bath, and produced the bank post bill, and asked Mr. Down if it was a good one. Mr. Down replied that it was a bank post bill for 10*l.*, and was no doubt good, but to be of use it must have the name of the party to whom it was payable. The prisoner then left. In about half an hour he returned with the bill, and it then purported to bear the indorsement of "Mary A. Clarke," but which was proved not to be the signature of Mrs. Clarke. The prisoner said he was sent by his mistress to get it changed, and Mr. Down, knowing the prisoner to be a journeyman baker, in the employment of a Mrs. Burbage, at Clifton, cashed the bill, and subsequently passed it away in the course of his business. On the 2nd of April the bill was returned to him, on the ground that the indorsement was a forgery. He sent for the prisoner, and told him that the bill was forged, and that as he had to refund the amount, he expected the prisoner in turn to pay him. The prisoner promised to do so, and paid 2*l.* on account the same evening; 5*l.* more on the following day, and the balance of 3*l.* on the 6th of April, when Mr. Down delivered up the bill to the prisoner. On the following day a police officer went to the shop of the prisoner's employer, and on inquiring for the 10*l.* bill, the prisoner told him it was in a glove in the bakehouse, where it was found. The prisoner, on being questioned as to how he came by the bill, said he had met a sailor among the vessels in Cumberland basin, who said he was going to sail immediately, and would give him (the prisoner) 5*s.* to get the bill changed; and that this sailor put the name to the bill. It appeared that the prisoner, in the course of his employment, was in the habit of going to the vessels in the basin with bread. No proof was given of the handwriting of the prisoner, nor did it appear in evidence whether he could write or not. On the close of the case for the prosecution,

*W. H. Cooke*, for the prisoner, submitted that on three facts there was no evidence to go to the jury on the counts for forgery. There was no proof of handwriting, or even that the prisoner could write at all. It might therefore be assumed that he could not write.

*ERLE, J.*—At six o'clock the bill is in the hands of the prisoner without the indorsement; at half-past six he presents the bill with the forged indorsement. I think, if a man has an instrument in his possession without an indorsement or other writing, the subject-matter of the alleged forgery, and half an hour afterwards is found with the instrument indorsed, there is some evidence of forgery to go to the jury. Although the prisoner might not be able to write himself, yet if he got any one in the street to write the name, he is as much guilty of forgery as if he wrote it himself. I think in this case there is the same evidence to go to the jury on the counts for forgery as for uttering.

The jury acquitted the prisoner.

*E. V. Richards*, for the prosecution.

*W. H. Cooke*, for the prisoner.

REG.  
V.  
JAMES.  
—  
*Forgery—  
Evidence.*



## OXFORD CIRCUIT.

GLOUCESTERSHIRE SUMMER ASSIZES, 1849.

August 9.

REG. v. WILKINS AND ANOTHER. (a)

(Before Mr. Justice ERLE.)

*Evidence—Distinction between mere statements, and directions given and acts done.*

*A witness having stated that, by inquiries, he traced the prisoners from place to place :*

*Held, that the witness might properly say that he made inquiries, and in consequence of directions given to him in answer to those inquiries, he followed the prisoners from place to place until he apprehended them.*

THE prisoners were indicted for larceny. A police constable, who took the prisoners into custody, stated that he went in search of the prisoners, who had left the neighbourhood where the alleged offence was committed, and that he *traced* them from place to place (naming the places), until he apprehended them.

*Cripps*, for the prisoner, objected that the witness must confine himself to stating that he took the prisoners into custody at the place where he found them. His saying that he traced them from place to place was, in fact, letting in hearsay evidence of the prisoner's movements.

ERLE, J.—Half the transactions of life are done by means of words. There is a distinction, which it appears to me is not sufficiently attended to, between mere statements made by and to witnesses, that are not receivable in evidence, and directions given and acts done by words, which are evidence. The witness, in this case, may say that he made inquiries, and in consequence of directions given to him in answer to those inquiries, he followed the prisoners from place to place until he apprehended them.

The prisoners were convicted.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

## OXFORD CIRCUIT.

GLOUCESTERSHIRE SUMMER ASSIZES, 1849.

August 10.

REG. v. MATTHEWS. (a)

(Before Mr. Justice ERLE.)

*Evidence—Cross-examination—Depositions.*

*Where, on cross-examination, a witness is asked, with permission of the judge, to look at his deposition before the committing magistrate, and say whether he still adheres to his present statement, and it appears the witness is unable to read, the depositions cannot be read to the witness for the same purpose without being put in as evidence.*

**T**HE prisoner was indicted for an assault, with intent to commit a rape.

*Huddleston*, for the prisoner, in cross-examination of a witness for the prosecution, endeavoured to elicit that the evidence of the witness on the trial differed from his statement before the committing magistrate, without putting in the deposition as evidence on the part of the prisoner. At his request the deposition was put into the hands of the witness, who was asked to look at it to refresh his memory, and say whether, after reading it, he still adhered to his statement in the witness-box. The witness, however, said that he could not read.

*Huddleston* then applied for his lordship's permission to allow the officer of the court to read the deposition to the witness, and cited the case of *Rex v. Edwards* (8 C. & P. p. 31), where, in the course of the trial, it was proposed, on the part of the prisoner, to put the depositions into the hands of a witness, and desire him to look at his own, and refresh his memory by it, and then to ask him whether, after having so done, he would adhere to the statement which he had just made? The judges (Littledale and Coleridge, J. J.) thought there was no objection to this mode of proceeding; but the witness, on being asked to read over his deposition, said that he could not read writing, and the judges said there was no objection to his deposition being read over to him, and the officer of the court read it over to him accordingly. This case had been cited to Mr. Justice Coltman at the last Spring Assizes at Shrewsbury, who acted upon it. (b)

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

(b) *Reg. v. Tooker*, Shrewsbury, 19th March, 1849. Coltman, J. there said: "I do not accede to this case (*Rex v. Edwards*), but there being one, I think it right that the prisoner should have the benefit of it."

REG.  
v.  
MATTHEWS.  
—  
Evidence.

ERLE, J.—I believe the report of the case cited was founded upon a misconception, and being afterwards loosely quoted, was somewhat inconsiderately acted upon. At all events, I am clear that the course suggested would be irregular, and contrary to all rule. The practice which permits, on cross-examination, the depositions to be put into a witness's hands, to look at and say whether he adheres to it, is on the extreme verge of the established rules of evidence, and cannot be further extended. To do what I am now asked, would be, in effect, putting the officer of the court in the position of a witness, without being on oath, to contradict the testimony of the sworn witness in the box. I cannot permit such a practice before me.

*Cripps*, for the prosecution.

*Huddleston*, for the prisoner.

## CENTRAL CRIMINAL COURT AND COURT OF CRIMINAL APPEAL.

AUGUST SESSION, 1849.

August 23.

REG. v. SMYTHIES. (a)

*Indictment for forgery at common law—Venue—11 Geo. 4 & 1 Will. 4, c. 66, s. 24—Uttering at common law.*

*An indictment for forgery at common law alleged that the prosecutor had given to the defendant a consent by word of mouth, but not in writing, that his name might be used as next friend to certain infant plaintiffs in Chancery, on condition that he should not be answerable to the defendant (the solicitor for the said plaintiff,) for any costs; and it then charged that the defendant, intending fraudulently to make it appear that the prosecutor had consented that his name should be used as the next friend of the said plaintiff, absolutely and without any undertaking, promise, or agreement on the part of the said defendant touching the costs attending the said cause, forged a consent in these words:—"Miles v. Miles.—I hereby consent to be next friend to the infant for the purposes of this suit.—RICHARD SODEN."*

*Held, that there was a sufficient fraud disclosed on the face of the indictment.*

*On a trial for forgery, a defendant, who was for the first time in custody at the time when the trial began, is within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 24, and the court has jurisdiction to try him, although the offence was committed at a place out of the jurisdiction.*

*Quære, Whether a count for uttering at common law can be sustained, where no fraud has been actually perpetrated by such uttering?*

**T**HE defendant was charged with forgery at common law, and the indictment was as follows:—

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

Central Criminal Court, to wit.—The jurors of our Lady the Queen, upon their oath present, that heretofore and before the committing of the offence hereinafter next mentioned, a certain cause had been commenced and was depending in Her Majesty's High Court of Chancery, in which said cause Matilda Catherine Miles, Adelaide Miles, Ann Miles, and Elizabeth Miles, infants, by Richard Soden their next friend, were plaintiffs, and Ezra Miles, Charles Gadderer, Herbert Harris Carman, Ann Collyer, James Collyer, William Miles, Alfred Miles, Frederick Miles, and Martin Miles were the defendants by original bill; and in which said cause the said M. C. Miles, late an infant, and A. Miles, Ann Miles, and E. Miles, infants, by Richard Soden their next friend, were plaintiffs, and Ezra Miles, C. Gadderer, H. H. Carman, A. Collyer, J. Collyer, W. Miles, A. Miles, F. Miles, M. Miles, S. Jervis, H. O. Thomson, and Sir William Henry Dillon, knight, were the defendants by amended bill; and in which said cause the said M. C. Miles, late an infant, and A. Miles, Ann Miles, and E. Miles, infants, by Richard Soden their next friend, were plaintiffs, and R. S. Sturgis and J. Lawrence were the defendants by supplemental bill. That heretofore and before the commencement of the said cause, and before the committing of the offence hereinafter next mentioned, to wit, on the 29th day of May, A.D. 1848, Henry Smythies, late of the parish of St. Andrew, Holborn, in the county of Middlesex, and within the jurisdiction of the Central Criminal Court, solicitor, then and from thence hitherto being one of the solicitors of the said High Court of Chancery, had applied to the said Richard Soden and requested him to be and to permit his name to be used as the next friend in the said cause of the said Matilda Catherine Miles, Adelaide Miles, Ann Miles, and Elizabeth Miles, the said plaintiffs, who at the said time of the said application of the said Henry Smythies, and at the time of the commencement of the said cause, were infants, and each of them respectively was an infant within the age of twenty-one years, and that at the said time of such application and request the said Richard Soden was unwilling to be or to allow his name to be used in the said cause as the next friend of the said M. C. Miles, A. Miles, Ann Miles, and E. Miles, whereupon the said H. Smythies then and there informed the said Richard Soden that he, the said Richard Soden, should not nor would be liable for any costs, charges, or disbursements which might be incurred in or about the said cause. That the said Richard Soden then and there by word of mouth, but not in writing, consented to be and to allow his name to be used in the said cause as such next friend to the said plaintiffs as aforesaid, upon the distinct agreement and undertaking of the said Henry Smythies that he, the said Richard Soden, should not be liable for any costs, charges, or disbursements which might be incurred in the said cause, and the said Henry Smythies then promised the said Richard Soden that he, the said Richard Soden, should not be liable to him, the said Henry Smythies, or to any other person for any such costs, charges, or disbursements. That the said Henry Smythies, from the time of

Rso.  
v.  
SMYTHIES.  
—  
Forgery—  
Venus—  
Uttering.

Indictment.

REG.  
v.  
SMYTHIES.

—  
Forgery—  
Venus—  
Uttering.

Indictment.

the commencement of the said cause until the 10th day of October, A.D. 1848, was the solicitor for and acted as and conducted the said cause as solicitor in the said cause, on behalf of the plaintiffs in the said cause, on which said 10th day of October, A.D. 1848, by an order duly made in the said cause, one Thomas Kirk was substituted as the solicitor in the said cause, on behalf of the plaintiffs in the said cause, in the room of the said Henry Smythies. That afterwards, and after the making of the said order for changing the solicitor in the said cause, and after the making of the undertaking, promise and agreement by the said Henry Smythies as hereinbefore mentioned, and before the committing of the offence hereinafter next mentioned, the said Henry Smythies delivered to the said Richard Soden a bill of fees, charges and disbursements amounting to a large sum of money, to wit, to the sum of 355*l.* 5*s.* 11*d.*, alleged by the said Henry Smythies to be due and owing from the said Richard Soden to the said Henry Smythies for the fees, charges and disbursements incurred by him the said Henry Smythies in and about the management and conduct of the said cause as solicitor on behalf of the plaintiffs in the said cause. That afterwards, and after the expiration of one month from the delivery of the said bill, and before the committing of the offence hereinafter next mentioned, to wit, on the 16th day of February, A.D. 1849, a certain action had been commenced, and at the time of the committing of the offence hereinafter next mentioned, was pending in Her Majesty's Court of Exchequer of Pleas at Westminster, in which said last-mentioned action the said Henry Smythies was the plaintiff and the said Richard Soden was the defendant, and in which said last-mentioned action the said Henry Smythies sought to recover from the said Richard Soden the said sum of 355*l.* 5*s.* 11*d.*, as and for the said fees, charges and disbursements of the said Henry Smythies in and about the management and conduct of the said first-mentioned cause as solicitor on behalf of the said plaintiffs in the said first-mentioned cause. That afterwards, and after the delivery of the said bill, and after the commencement of the said action, and whilst the said last-mentioned action was so pending as aforesaid, and before the committing of the offence hereinafter next mentioned, to wit, on the 19th day of March, A.D. 1849, upon the petition of the said Richard Soden, duly presented to the said High Court of Chancery, an order was duly made by the said last-mentioned court for the taxation of the said bill of the said Henry Smythies, which said order is to the tenor and effect following, that is to say—

“Monday, the 19th day of March, in the 12th year of the reign of Her Majesty Queen Victoria, 1849.

“*In the matter of Henry Smythies, one of the solicitors of this court.*

“Upon the humble petition of Richard Soden, of Castlethorpe, in the county of Bedford, farmer, this day preferred unto the Right Honourable the Master of the Rolls, it was alleged that the petitioner was applied to by the above-named Henry Smythies to become the next friend of the plaintiffs in a cause, *Miles v. Miles*,

now pending in this court, and that he consented thereto, upon an arrangement with the said Henry Smythies, that the petitioner should not be liable for the payment of his bill of costs as the plaintiff's solicitor in the said cause, and under such circumstances the said Henry Smythies was employed by the petitioner as his solicitor therein. That notwithstanding such arrangement the said Henry Smythies has lately delivered his bill of fees and disbursements in the said cause against the petitioner, and has commenced an action against him in Her Majesty's Court of Exchequer to obtain payment of the said bill. That the petitioner is advised that the said bill contains unreasonable, extravagant and improper charges, and without waiving his right to dispute his liability to pay the same upon the trial of the said action, he is desirous that the said bill of costs should be taxed. That the petitioner is advised that he has a good defence to the said action, and he intends to defend the same. It was therefore prayed, and it is accordingly ordered, that it be referred to the Taxing-master of this court in rotation to tax and settle the said bill, and that the petitioner and also the said Henry Smythies do produce before the said master upon oath, as he shall direct, all books, papers and writings in their custody or power respectively relating to the matters hereby referred or any of them, and that they be examined upon interrogatories touching the same matters or any of them as the said master shall direct. And it is ordered that if such bill when taxed be less by a sixth part than the said bill so delivered, the said master do tax the petitioner his costs of such reference. And if such bill when taxed shall not be less by a sixth part than the said bill so delivered, the said master do tax the said Henry Smythies his costs of such reference. And it is ordered that the said master do certify the amount of the said bill when taxed, and also the costs of such taxation so to be taxed as aforesaid.

"J. A. M.

"Entered, J. A. M."

That the said Henry Smythies well knowing the said several premises aforesaid, and falsely and unlawfully devising, contriving and intending unjustly, maliciously and fraudulently to aggrieve, oppress, impoverish and defraud the said Richard Soden, and to make it appear that the said Richard Soden had consented that his name should be used as the next friend of the said plaintiffs in the said first-mentioned cause, absolutely and without any undertaking, promise or agreement on the part of the said Henry Smythies touching the costs, fees, charges and disbursements attending the said cause, and to enable him the said Henry Smythies to recover the said fees, charges and disbursements so as aforesaid alleged to be due to the said Henry Smythies as solicitor in the said first-mentioned cause from the said Richard Soden, afterwards and whilst the said last-mentioned action was so pending as aforesaid, and before the taxation of the said bill, in pursuance of the said last-mentioned order, to wit, on the 3rd day of April, A.D. 1849, with force and arms at the parish aforesaid in the county aforesaid, and within the jurisdiction of the Central Criminal Court, unlawfully,

REG.  
v.  
SMYTHIES.  
—  
Forgery—  
Venus—  
Uttering.

REG.  
v.  
SMYTHIES.  
—  
Forgery—  
Venue—  
Uttering.

knowingly, fraudulently and falsely did forge and counterfeit a certain writing on paper in the form of and purporting to be a consent in writing by the said Richard Soden to be the next friend of the said plaintiff in the said first-mentioned cause for the purposes of the said first-mentioned cause, and which said forged writing or paper is to the tenor following, that is to say—

“In Chancery :—

“*Miles v. Miles.*

“I hereby consent to be next friend to the said infants for the purposes of this suit.—RICHARD SODEN.”

Indictment.

That the said Henry Smythies afterwards and whilst the said last-mentioned action was so pending as aforesaid, and at and upon the taxation of the said bill of the said Henry Smythies in pursuance of the said order for taxation of the said bill, before one Henry Ramsay Baines, then and there being one of the masters of the said High Court of Chancery and the Taxing-master in rotation to whom the taxation of costs in the matter of the said last-mentioned order was referred, to wit, on the said 3rd day of April, A.D. 1849, at the parish aforesaid, and within the jurisdiction of the Central Criminal Court, the said false, forged and counterfeit writing or paper so falsely forged as aforesaid, purporting to be a consent in writing by the said Richard Soden to be the next friend of the said infants for the purposes of the said first-mentioned cause, falsely, knowingly and fraudulently did pronounce and publish, and then and there, to wit, on the said 3rd day of April, A.D. 1849, at the parish aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, falsely, knowingly and fraudulently, as a true consent in writing by the said Richard Soden to be the next friend of the said infants in the first-mentioned cause, did deliver to the said Henry R. Baines, then and there being such master of the said High Court of Chancery engaged in and about the taxation of the said bill of the fees, charges and disbursements of the said Henry Smythies in the said first-mentioned cause, to the great damage and prejudice of the said Richard Soden, to the evil example of all others in the like case offending, and against the peace, &c.

The 2nd count was for uttering the consent mentioned in the 1st count.

The evidence went to show that the forgery was committed at Aylesbury, in Buckinghamshire, but that the uttering took place in London.

At the close of the case for the prosecution,

Argument for  
the defendant,  
that fraud was  
not shown on  
the face of the  
indictment.

*Cooke and Robinson*, for the defendant, submitted that the indictment could not be sustained. It was for a forgery at common law, and such an indictment must contain on the face of it some clear case of fraud upon the prosecutor; but here there was nothing to show that the prosecutor could be injured in the slightest degree. It was admitted by the indictment that he had consented that his name should be used as the next friend of the plaintiffs in the Chancery suit, and the paper alleged to be forged merely tended to establish that consent. The indictment, it was true, stated that

to that verbal consent admitted to have been given there was annexed a condition that he should not be answerable for costs, and afterwards recited that "the defendant, intending to make it appear that the said Richard Soden had consented that his name should be used as the next friend of the said plaintiffs in the said first-mentioned cause absolutely and without any undertaking, promise or agreement on the part of the said Henry Smythies touching the costs," &c. did forge the said consent, but no such intent could be drawn from the act alleged. Any agreement with the defendant that the prosecutor should not be liable for costs might still be given in evidence to qualify the written instrument, for to attempt to enforce it as an unconditional consent would be fraud, and might be resisted. The prosecutor was not, therefore, placed in a situation of greater responsibility than he was before. If there was any fraud at all, it was rather in the attempt to create evidence of a contract that had been really entered into, but this was not the fraud alleged in the indictment.

REG.  
v.  
SMYTHIES.  
—  
Forgery—  
Venue—  
Uttering.

ERLE, J.—I think that there is a sufficient fraud stated on the face of the indictment. It alleges that a verbal consent was given under certain conditions, and the consent alleged to be forged is a written one and purports to be given without any condition at all. I am of opinion, therefore, that a fraud upon the prosecutor is sufficiently shown.

Judgment of  
Erle, J. as to  
fraud.

Cooke then submitted that, as to the count for forgery, there was no jurisdiction in the court to try it. The evidence tended to show that the forgery, if committed at all, was committed out of the jurisdiction of the Central Criminal Court. The 24th section of the 11 Geo. 4 & 1 Will. 4, c. 66, enacted that "if any person shall commit any offence against this act, or shall commit any offence of forging or uttering any matter whatsoever, or of offering, uttering, disposing of or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law or by virtue of any statute or statutes made or to be made, the offence of every such offender may be dealt with, indicted, tried and punished, and laid and charged to have been committed in any county or place in which he shall be apprehended, or be in custody, as if his offence had been actually committed in that county or place," &c. Here the prisoner was not shown to have been in custody until the trial began, and in *R. v. Whiley* (2 M. C. C. 186), it was decided that, under such circumstances, the objection was fatal. Then, with regard to the count for uttering, no fraud was in fact perpetrated by it, and therefore it could not be supported. In *R. v. Boulton* (2 Car. & K. 604), it was laid down by Cresswell, J., after consulting Patterson, J., that the uttering of a forged instrument, the forgery of which was only a forgery at common law, was no offence unless the fraud had been actually committed.

Argument for  
defendant as to  
jurisdiction.

ERLE, J., left it to the jury to decide generally with respect to the indictment, asking them specifically whether they were satisfied that the forgery, if committed at all, was committed within the

Judgment.



Rgo.  
v.  
SMYTHIES.  
—  
Forgery—  
Venus—  
Uttering.

jurisdiction of the Central Criminal Court. The other questions he reserved.

The jury found the defendant guilty upon both counts, but that as to the forgery there was no evidence of its having been committed within the jurisdiction of this court.

The case was afterwards submitted to the judges of the Court of Criminal Appeal:—

#### COURT OF CRIMINAL APPEAL.

November 20, 1849.

(Before POLLOCK, C. B., PATTESON, B., PARKE, B., WIGHTMAN, J., and TALFOURD, J.)

#### CASE.

Case.

1st. Forging a consent to act as next friend in Chancery.

2nd. Uttering the same with intent to defraud.

The prisoner was not shown to have been in custody till the time when the trial began. The jury found, as to the 1st count, that he was guilty of forging, but that there was no evidence of its having been done within the jurisdiction of the court. As to the 2nd count, guilty.

The questions are—First. Was the prisoner indicted, when he was in custody, within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 24, he not being shown to be in custody till the time of the trial? If not—

Second. Is the uttering of a forged instrument with intent to defraud, where the forging is a misdemeanor at common law, a misdemeanor? (see *R. v. Boulton*, 2 Car. & Kir. 604.)

W. ERLE.

*Keating*, for the defendant, was contending that the case must be decided by that of *R. v. Whaley*, when he was interrupted by

Judgment.

PARKE, B.—The report of that case is erroneous in Mr. Moody's work. The decision was the reverse of what he states it to have been. I have my notes of the case here, in which I find that Lord Denman thought the conviction wrong. Tindal, C. J., and Lord Abinger thought it right, and Littledale, J., doubted, but the rest of the judges were of opinion that it was good. It was decided on the precedent in *Foster*, 12, on the trial in 1745 of *Berwick*, one of the rebels. I find the case correctly reported in 1 C. & K. 150. Our decisions were not then given in open court as they are now, and hence, probably, the mistake in reports which are generally very accurate.

*Keating* objected that, at all events, the jury had not found a verdict of guilty generally. They had, in fact, given a special verdict.

POLLOCK, C. B.—No, not a special verdict; they have found a verdict of guilty, with a memorandum stating facts which may

raise the point of law. This is not the place for discussing special verdicts. We think the finding amounts to a conviction.

*Conviction affirmed.*

*Clarkson, Bodkin, and Huddleston* for the prosecution in court above.

*Cooke and Robinson* for the defendant.

*Huddleston* for the prosecution in the Court of Appeal.

*Keating* for the defendant.

REG.  
v.  
SMYTHIES.  
—  
Forgery—  
Venue—  
Uttering.

## Ireland.

### COURT OF CRIMINAL APPEAL.

February 15, 1850.

(Before BLACKBURNE, C. J., DOHERTY, C. J. C. B., CRAMP-  
TON, J., PERRIN, J., BALL, J., RICHARDS, B., LEFROY, B.,  
and MOORE, J.)

REG. v. MURPHY. (a)

*Embezzlement—Friendly society.*

*In an indictment against a clerk, stating that he, being then and there employed as clerk to A. B. and others, did by virtue of his said employment, then and there, and whilst he was so employed as aforesaid, receive and take into his possession certain money, to wit, 29l. 15s. 8d., for and on account of the said A. B. and other his masters, and the said money then and there fraudulently did embezzle, averring the said money to be the property of the said A. B. and other his masters, from the said A. B. &c. feloniously did steal, &c. The 2nd count stating the person to be employed as clerk to A. B., C. D., and E. F., and laying the property in them ;*

*Held, first, that it was sufficient to warrant a conviction for embezzlement, to prove that the prisoner was employed as secretary of a friendly society, and had not duly accounted according to the rules of the society, and that having taken upon himself to collect moneys, he was answerable as a servant for embezzling such moneys. Secondly, that although the prisoner was himself a member of the society, by the rules, all the property of the society being vested in trustees, he was guilty of embezzling a portion of the funds, and the property was rightly laid in the indictment as the property of the employers. Thirdly, it was not material whether the prisoner received payment for the discharge of the duties he undertook or not, because, being the servant of the society, he was answerable for the due discharge of any office he undertook to perform.*

CASE.

**WILLIAM MURPHY** was indicted and tried before Judge Case. Perrin and myself at this commission. For that he, on the 17th December, in the 12th year of the Queen, being employed as

(a) Reported by J. R. O'FLANAGAN, Esq., Barrister-at-Law.

REG.  
v.  
MURPHY.  
*Embezzlement-  
Friendly  
Society.*

clerk to the Rev. Theobald Mathew, and others, did receive into his possession a sum of money, to wit, 29*l.* 15*s.* 8*d.* of their money, and did fraudulently and feloniously embezzle and steal the same, against the peace, &c., and the statute, &c.

There was a 2nd count in the indictment which stated that the prisoner was the clerk of Theobald Mathew, Thomas Hughes, and Pat. Brophy: but in other respects the 2nd count was similar to the 1st.

It appeared upon the evidence, that the prisoner was the secretary and treasurer of a friendly society called "The Princess Royal National Total Abstinence Tontine Society," and that the prisoner had, whilst acting in such capacities, received the subscriptions payable by the different members of the society, and that there was a balance in his hands of such subscriptions over and above all disbursements thereout, amounting to the sum of 29*l.* 15*s.* 8*d.* up to and for the 17th September, 1848. It appeared upon the evidence of Patrick Murphy, a member of the society, that the Rev. Theobald Mathew, Thomas Hughes and Patrick Brophy, in whom the property was laid in the indictment, were the president and stewards of the society, at the time when the offence was committed by the prisoner. The certified rules of the society were produced and proved; and by the 23rd rule, the president and stewards for the time being are declared to be "the trustees of the society, and that all moneys, goods, chattels, effects and property whatever belonging to the society should be vested in them, as such trustees, for the use and benefit of the society, and the respective members thereof; and such trustees shall, when properly authorized by the society, bring or defend any action, suit, or prosecution, concerning any property, right or claim of this society."

Case.

The rules also name the Rev. Theobald Mathew president of the society. It further appeared, that the members of the society were in the habit of meeting on certain quarterly days for the purpose of auditing and settling the accounts of each quarter, and that the 17th September, 1848, was one of those quarterly days of meeting, and the 17th December, 1848, another quarterly day of meeting, but the 17th December, 1848, having fallen on a Sunday, the meeting took place on the 18th of that month. It further appeared, that it was the course and practice of the society, if any surplus or balance of the funds remained in the hands of the treasurer and secretary, that such surplus was distributable before Christmas in each year, and that it was the duty of the prisoner to have such surplus, or balance, if any, ready to be paid over when required so to do. It appeared that two books were kept by the prisoner, one of which books was called at the trial, the day-book and the other the ledger, and it appeared that all subscriptions paid in by the members to the prisoner at the different weekly evening meetings of the society were entered by him, at the time of the payment thereof, in his day-book, and that those several payments, as well as the disbursements by the prisoner thereout, were afterwards, at the end of each quarter, transferred

to the ledger, and a balance struck on foot of such account, showing the clear balance in the hands of the prisoner at the termination of each quarter; and that the before-mentioned sum of 29*l.* 15*s.* 8*d.* was the clear balance in the hands of the prisoner at the end of the quarter ending 17th September, 1848. It appeared, however, that with reference to the quarter ending the 17th December, 1848, the prisoner had not brought forward his intermediate receipts between the 17th September and 17th December, into the ledger, though they amounted, as appeared by his day-book, to 12*l.* 8*s.* 2*d.*, and though he did bring forward his disbursements for the same period, which amounted to the sum of 9*l.* 5*s.* 6*d.* It further appeared, that very shortly after the meeting of the society on the 18th December, 1848, preparatory to the distribution of the surplus funds of the society amongst its members, the prisoner left his house and residence in the city of Dublin, and disappeared altogether with the funds of the society, and that he could nowhere be found, and that he remained concealed till about the end of October, 1849, when he was arrested, and the present indictment afterwards preferred against him. It appeared by the two account books produced on the trial, which were all in the handwriting of the prisoner, that he took credit for different sums against the moneys that came to his hands as payments to himself as secretary to the society, and which could only be understood as payments to the prisoner as a remuneration for his trouble as an officer of the society, and no distinction appeared to have been taken in the books of the society, or in the general rules of the society, or upon the evidence adduced on the trial between the office of the secretary and of treasurer—in fact, the title “Treasurer” did not appear in any of those documents, nor in the prisoner’s accounts; though the title “Secretary” was mentioned frequently in all those documents, and in the general rules of the society. It also appeared from the evidence, that the prisoner himself was one of the members of the society. There was a good deal of other evidence given on the trial, which I think it unnecessary to state, as it does not appear to me to bear upon any of the objections relied on by the counsel for the prisoner.

REG.  
v.  
MURPHY.  
—  
*Embezzlement-  
Friendly  
Society.*

Case.

The case for the crown having been closed, the counsel for the prisoner called upon the court to direct a verdict of acquittal upon the following grounds:—1st, Because he insisted that the prisoner had fairly accounted with the society, and that he had not denied the receipt of the money, and that his offence at most amounted to nothing more than a breach of trust, but not to embezzlement. 2ndly, Because the prisoner, being himself a member of the society, he could not be convicted of embezzlement of the money mentioned in the indictment, the same or some part thereof being, as he insisted, the property of the prisoner himself. Thirdly, Because the prisoner had, as he insisted, received the money as treasurer, for which employment he insisted it did not appear in evidence that the prisoner had received any payment or remuneration.

With the concurrence of Judge Perrin, I suffered the case to

REG.  
v.  
MURPHY.  
—  
*Embezzlement-  
Friendly  
Society.*

go to the jury, who found the prisoner guilty. We postponed sentence, the prisoner remaining in custody, in order that these points should be considered and decided by the judges, for whose opinion and consideration we reserved them, under the 11 & 12 Victoria. And I directed that the witness Murphy should have the day-book and ledger, and a copy of the printed rules of the society, to be produced before your lordships.

JOHN RICHARDS.  
L. PERRIN.

Indictment.

County of the City of Dublin, to wit.—The jurors for our Lady the Queen upon their oath do say and present, that William Murphy, late of the parish of St. Mary, in the county of the city of Dublin, yeoman, on the 17th day of December, in the 12th year of the reign of our Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith and so forth, at the parish of St. Mary, in the county of the city of Dublin aforesaid, being then and there employed as clerk to the Very Rev. Theobald Mathew and others, did by virtue of his said employment then and there, and whilst he was so employed as aforesaid, receive and take into his possession certain money to a large amount, to wit, to the amount of 29*l.* 15*s.* 8*d.*, for and on the account of the said Theobald Mathew and others his masters, and the said money then and there fraudulently and feloniously did embezzle, and so the jurors aforesaid, upon their oath aforesaid, do say that the said William Murphy, then and there in manner and form aforesaid the said money the property of the said Theobald Mathew and others his said masters from the said Theobald Mathew and others his said masters feloniously did steal, take and carry away, against the form of the statute in such case made and provided and against the peace of our said Lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further say and present, that the said William Murphy, on the said 17th day of December, in the said 12th year of the reign aforesaid, at the parish of St. Mary aforesaid, in the county of the city of Dublin aforesaid, being then and there employed as clerk to the said Theobald Mathew, Thomas Hughes, and Patrick Brophy, did, by virtue of his said employment, then and there, and whilst he was so employed as aforesaid, receive and take into his possession certain money to a large amount, to wit, to the amount of 29*l.* 15*s.* 8*d.* for and on the account of the said Theobald Mathew, Thomas Hughes, and Patrick Brophy, his masters, and the said money then and there fraudulently and feloniously did embezzle, and so the jurors aforesaid, upon their oath aforesaid, do say that the said William Murphy, then and there, in manner and form aforesaid, the said money, the property of the said Theobald Mathew, Thomas Hughes and Patrick Brophy, his said masters, from the said Theobald Mathew, Thomas Hughes and Patrick Brophy, his said masters, feloniously did steal, take and carry away, against the peace of our said Lady the Queen, her crown and dignity,

and contrary to the form of the statute in such case made and provided.

*Cruise*, for the prisoner.—The duty of the prisoner, as secretary of the society, was to enter the receipt of the subscriptions of the members, to keep an account of all disbursements, to keep a correct day-book and ledger. The accounts were to be audited every quarter, and when any balance appeared, there was an annual distribution every Christmas. On the 17th September, 1848, the prisoner had his accounts audited, and it then appeared that a balance was in the hands of the prisoner amounting to 29*l.* 15*s.* 8*d.*; and I contend that the prisoner, having accounted fairly, cannot be guilty of the crime of embezzlement. There is no imputation of fraud, or suppression, or keeping back matters to prevent the society from ascertaining the state of the accounts, and the question comes to this, can the prisoner, having admitted the sum of 29*l.* 15*s.* 8*d.* to be in his hands, be indicted for embezzlement? Up to the period of 17th September, he must be taken to have acted as secretary, and from thenceforward the money remained in his hands as treasurer, for which office he received no pay, so we contend the relationship of servant of the society never existed to sustain a charge of this kind. This was constructive change of possession: (*The Queen v. Norval*, 1 Cox's Cr. L. 95.) [PERRIN, J.—Is there anything in the rules distinguishing the office of secretary from that of treasurer?] The office of treasurer is not in the rules at all; the secretary is alone named. When he admitted the balance in his hands as secretary, and a trust was placed in him to keep it until distribution, he no longer held it as servant of the society, the possession having been constructively changed: (*Beasley's case*, 2 East P. C.; *Rez v. Grove*, 1 Mood. C. C. 447.) The indictment cannot be sustained, as the offence here does not amount to embezzlement, as the prisoner did not stand in the relation of a servant to the society after the 17th September: (*Crust's case*, 1 Car. & Kir. 63; *Hodson's case*, 3 Car. & P. 422; *Norman's case*, Car. & M. 501; *Murray's case*, 1 Mood. 176.) It is clear from authority, that if money is left in the hands of a clerk after accounting for it, he cannot be chargeable with embezzlement. The accounting changes the character of possession: (*Waite's case*, 2 Cox, 345.) On the point that the prisoner, being a member of the society, is part owner of the funds, and cannot be guilty of taking his own property, was cited *Willis's case* (1 Mood. 375.)

*Baldwin*, Q. C.—The argument on the other side comprehended the first and third points, and it was contended the offence of the prisoner amounted to a breach of trust and not to embezzlement. It is material to consider what the prisoner was bound to do. He was bound to account quarterly. He became the secretary, knowing there was to be an annual distribution of any balance which remained in his hands as secretary until the period of distribution arrived, so that, in point of fact, no change of possession ever could take place. The argument for the prisoner is answered by a note

REG.  
v.  
MURPHY.  
Embezzlement-  
Friendly  
Society.

Argument of  
*Cruise* for the  
prisoner.

Argument of  
*Baldwin*, Q. C.  
for the crown.

REG.  
v.  
MURPHY.  
—  
*Embezzlement-  
Friendly  
Society.*

of the society which shows the distribution of the funds only took place at Christmas. *Curl's case* is quite distinguishable from this—there time was given to pay the money, and the character in which it was held was changed. If a person bound to account does not do so, it will amount to embezzlement: (*Reg. v. Walsh*, 1 Den. Cr. C. 199; *The King v. Jackson*, 1 Car. & Kir. 384.) [BLACKBURN, C. J.—I should think the word “account” means “to account and pay;” if he does not do this, he does not account. CRAMPTON, J.—When do you say the embezzlement took place?] On the 18th December, when he neglected to account. The argument for the prisoner is, that he did account; we say he did not, the balance in his hands on 17th September ought to have been brought forward, and instead of doing so, he absconded. With respect to the point about his being treasurer, we say he was the secretary, and there is no such office as treasurer. It was as secretary he was entitled to receive remuneration. With respect to the case cited on the question of property, *Willis's case*, it does not affect this case at all, and there are a number of authorities to be found showing that, when property is vested in trustees, it will be the subject of embezzlement by a person in the employment of the society, and is rightly laid as the property of the trustees: (*The Queen v. Kane*, 2 Mood. C. C. 204; *Reg. v. Millen*, ib. 249; *Reg. v. Hall*, 1 Mood. C. C. 474.) [LEFROY, B.—The difficulty I feel is this, whether the prisoner, who appears on the evidence to be the secretary of this society, stood in the capacity of clerk or servant at all to the trustees, taking it to be his duty to collect the subscriptions, to account for them and keep them safe. If doing this constitutes him a servant within the meaning of this indictment, I cannot distinguish the case of any banker, agent, or receiver. *Burton's case* (1 Mood.), makes me desirous you would argue that the prisoner is a servant. From the rules it appears the trustees had no power to dismiss him. Is he, then, their servant?] The case of *Reg. v. Hall*, and *Jenson's case* (ib. 434), affirm this point. [PERRIN, J.—By the 33rd sect. of the act (10 Geo. 4, c. 56) under which the secretary is appointed, it is enacted that the accounts shall be countersigned by the secretary. LEFROY, B.—This I take to be a legal declaration of the duties to be performed by this officer.]

*J. A. Curran* (for the prisoner) replied.

*Smyly* (for the crown) was not called upon.

Judgment of  
Blackburne,  
C. J.

BLACKBURN, C. J.—In this case the prisoner is indicted for embezzling the sum of 29*l.* 15*s.* 8*d.* received by him as clerk to the Very Rev. Theobald Mathew and others, and in another count as having, in this capacity of clerk, embezzled the said money, stating it as the property of the said Theobald Mathew, Thomas Hughes and Patrick Brophy, who, it appears, were the trustees of the said society. We are of opinion that the property was rightly laid in this indictment, and that the prisoner is not entitled to any estate or interest in the funds so as to enable him to raise any question as to property. The questions we have to decide are

three : 1st. Was the prisoner in the capacity of clerk to these trustees? 2nd. Did he cease to be so at the time of the embezzlement? 3rd. Was there evidence to go to the jury to sustain the charge of embezzlement against the prisoner? With respect to the first question, it is immaterial to consider, whether he filled the office of secretary or treasurer, or both, because it appears that he was employed to collect the subscriptions, and that on the face of his account, a balance of 29*l.* 15*s.* 8*d.* appeared in his hands, and it was his duty to keep any surplus and have it ready for distribution when required so to do. In this state of things, can any one doubt but that on accepting this office he was to perform its duties? But it is contended that his duties as clerk ceased the moment the balance of the account was struck, and a new relationship between him and the trustees arose in respect of the balance in his hands. We do not think so. His obligations were unchanged. He was the clerk when he got the money, and he was the clerk when he absconded. *Curl's case* does not rule the present one; time was there given; a new and different trust and confidence was placed. Next, with respect to the question, had the prisoner ceased to be clerk at the time of the embezzlement? Look at the facts; the balance was struck on the 17th September; the next time for accounting was the 18th December, as the 17th (the quarter-day) fell on Sunday: as clerk he should have done so, but he does not; in the meantime he had absconded; is that no evidence to sustain the third question? As to the intention of the prisoner to appropriate the money, I think it is enough to say, here is evidence to warrant the jury in finding that the sum which remained in the prisoner's hands, at the time laid in the indictment, he intended to appropriate to his own use, and therefore the prisoner has been rightly convicted.

CRAMPTON, J.—The case of *The King v. Hall* appears to me to govern this case.

LEFROY, B.—I wish to say that I consider the present case as decided upon the principle, that the prisoner stood in the relationship of clerk and servant to the trustees.

BLACKBURN, C. J.—I shall grant a certificate in this case, as in the case of *The Queen v. Otway*.

REG.  
v.  
MURPHY.  
—  
Embezzlement-  
Friendly  
Society.



## CENTRAL CRIMINAL COURT.

DECEMBER SESSION, 1849.

December 21.

(Before COLERIDGE, J., and ROLFE, B.)

REG. v. SWAN. (a)

*Indictment against a bankrupt—5 & 6 Vict. c. 122—12 & 13 Vict. c. 106  
—Repeal of penal statute.*

*Where a statute creating an offence is repealed, a person cannot be afterwards proceeded against for any offence within it committed whilst it was in operation, even although the repealing statute re-enacts the penal clauses of the statute repealed.*

*The words "except as to the recovery and application of any penalty for any offence" which shall have been committed before the commencement of this act, in the 1st section of the 12 & 13 Vict. c. 106, do not apply to offences which are the subject of indictment, but refer to summary proceedings under which a pecuniary penalty may be awarded.*

*The penal clauses of the 5 & 6 Vict. c. 122 are repealed by the 12 & 13 Vict. c. 106.*

*Schedule (A) to the 12 & 13 Vict. c. 106, is controlled by the 1st section, so that the repeal of the 6 Geo. 4, c. 16, though expressed in the schedule to extend to the whole statute, has not the effect of reviving those statutes which the 6 Geo. 4, c. 16, itself repealed.*

Indictment.

THE indictment against the defendant charged—That heretofore and after the passing and commencement of a certain act of Parliament made and passed in a session of Parliament holden in the fifth and sixth years of the reign of our Lady the Queen, intituled "An Act for the Amendment of the Law of Bankrupts," and before the committing of the offence hereinafter mentioned, to wit, on the 28th day of April, 1849, Hugh Swan, late of the parish of St. Pancras, in the county of Middlesex, labourer, was and from thence continually, until the issuing of the fiat in bankruptcy hereinafter next mentioned, was a linendraper and a trader within the true intent and meaning of the laws and statutes then in force relating to bankrupts, and subject and liable as such trader to the said laws and statutes, and exercising and carrying on the trade and business of a linendraper, and that the said Hugh Swan afterwards, to wit, on the day aforesaid, in the year aforesaid,

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

t the parish aforesaid, in the county aforesaid, became and was indebted to John Falshaw Pawson and John Stone, the said John Falshaw Pawson and John Stone, then and there being partners in a trade of the city of London, in a certain sum of money exceeding the sum of 50*l.*, to wit, the sum of 300*l.* for a true and just debt, due and owing from the said Hugh Swan to the said John Falshaw Pawson and John Stone, such partners as aforesaid, for the price and value of divers goods before then sold and delivered by the said John Falshaw Pawson and John Stone, as such partners as aforesaid, to the said Hugh Swan, and that the said Hugh Swan, afterwards, and whilst he was such trader as aforesaid, and exercising and carrying on the said trade and business of linen-draper, and whilst he was and continued indebted to the said John Falshaw Pawson and John Stone as aforesaid, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, did commit an act of bankruptcy, that is to say, by filing, in the office of the Lord Chancellor's secretary of bankrupts, a declaration in writing, signed by him the said Hugh Swan, as such trader as aforesaid, and attested by an attorney, that he the said Hugh Swan was unable to meet his engagements, and which said declaration is as follows:—

“I, the undersigned Hugh Swan, of No. 59, High-street, Camden Town, and of No. 15, Hanway-street, Tottenham-court-road, both in the county of Middlesex, draper, do hereby declare that I am unable to meet my engagements. Dated this 27th day of April, in the year of our Lord 1849.

REG.  
v.  
SWAN.  
—  
*Fraudulent  
bankrupt.*

Indictment.

“HUGH SWAN.

“Witness, ALBERT READ,

“Attorney of the Court of Queen's Bench,

“15, Tollington-park, Hornsey-road.”

and thereby then and there became and was a bankrupt, within the true intent and meaning of the said laws and statutes relating to bankrupts. That, after the committing of the said act of bankruptcy, and whilst the said Hugh Swan was such trader as aforesaid, and whilst he was and continued indebted to the said John Falshaw Pawson and John Stone as aforesaid, and within two calendar months from the said 28th day of April, 1849, to wit, on the 28th day of April, 1849, in the county aforesaid, a fiat in bankruptcy was duly and according to law made, signed and issued by the Right Hon. Charles Christopher Pepys, Lord Cottenham, then and there being Lord High Chancellor of Great Britain, on the petition of the said John Falshaw Pawson and John Stone, in that behalf made, to the said Lord High Chancellor in writing, the said John Falshaw Pawson and John Stone having, before the issuing of the said fiat, to wit, on the day last aforesaid, in the year aforesaid, in the county aforesaid, duly filed such affidavit as by the laws and statutes then in force relating to bankrupts was required, and the said Lord High Chancellor having then and there, as last aforesaid, dispensed with the said John Falshaw Pawson and John Stone entering into any bond, conditioned for

REG.  
v.  
SWAN.  
—  
*Fraudulent  
bankrupt.*

Indictment.

proving their said debt, and for proving the said Hugh Swan to have committed an act of bankruptcy at the time of issuing such fiat as aforesaid, and for proceeding upon such fiat as aforesaid, and which said fiat was, on the day last aforesaid, in the year aforesaid, directed to Her Majesty's Court of Bankruptcy in London, by which said fiat the said Charles Christopher Pepys, Lord Cottenham, did then and there authorize the prosecution of the fiat in the said Court of Bankruptcy in London, as by the said fiat, duly filed and entered of record, and now in the said Court of Bankruptcy in London, being a record of the said Court of Bankruptcy, reference being thereunto had, will more fully appear, and that the said fiat was forthwith, that is to say, on the day last aforesaid, in the year aforesaid, within the county aforesaid, issued and transmitted by William Vizard, then and there being the said Lord High Chancellor's Secretary of Bankrupts, to Her Majesty's said Court of Bankruptcy in London, under and by virtue of which said fiat, and by force of the statutes in such case made and provided, Edward Goulburn, Serjeant-at-Law, then being a commissioner of the said Court of Bankruptcy in London, did afterwards, to wit, on the 28th day of April, 1849, in London aforesaid, upon the application of the said John Falshaw Pawson and John Stone, and upon due proof upon oath before him, the said Edward Goulburn, of the said trading of the said Hugh Swan, and of the committing of the said act of bankruptcy by the said Hugh Swan, and of the above-mentioned facts, and of the matters requisite to support the said fiat in due form of law, find that the said Hugh Swan had become and was a bankrupt before the issuing of the said fiat, within the true intent and meaning of the said laws and statutes relating to bankrupts, and did then and there declare and adjudge the said Hugh Swan to be a bankrupt accordingly, as by the said adjudication now remaining of record in the said Court of Bankruptcy in London, reference being thereunto had, will fully appear. That after such adjudication and declaration as last aforesaid, and before notice of the said adjudication was given in the *London Gazette*, and before putting in execution any warrant of seizure granted upon such adjudication, to wit, on the 28th day of April, 1849, in the county aforesaid, a duplicate of the said adjudication was served on the said Hugh Swan personally, and no cause has been shown to the satisfaction of the said Court of Bankruptcy, or of the said Edward Goulburn, Serjeant-at-Law, for cancelling the said adjudication, although more than five days since the service of the said duplicate of the said adjudication as aforesaid had elapsed before the day of taking this inquisition, and the said fiat always, from the time of issuing thereof until and at the time of the taking of this inquisition, was, and still is, in full force and effect. That the said Hugh Swan heretofore and after the passing and commencement of the said act of Parliament, and whilst he was such trader as aforesaid, to wit, on the 2nd day of March, 1849, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the Central Criminal Court, did unlawfully,

designedly, wilfully and fraudulently, with intent to defeat the object of the laws and statutes relating to bankrupts, and with intent to defraud the creditors of the said Hugh Swan, then and here as last aforesaid, destroy certain papers belonging to him the said Hugh Swan, to wit, ten pieces of paper, then and there containing and having written upon them divers memorandums and entries relating to the sale of divers goods of the said Hugh Swan, of great value, to wit, of the value of 1,000*l.*, delivered by the said Hugh Swan to one Charles Walter Burton, for the purpose of sale by the said Charles Walter Burton, and sold by the said Charles Walter Burton for and on behalf of the said Hugh Swan, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. (a)

REG.  
v.  
SWAN.  
—  
*Fraudulent  
bankrupt.*

(a) The following are the sections of the act of Parliament and that part of the schedule material to the argument.

Sect. 1. That from and after the commencement of this act, the several acts and parts of Statute, sect. 1. acts set forth in the schedule A., to this act annexed, to the extent to which such acts or parts of acts are by such schedule expressed to be repealed, and every other act or acts, and such parts of every other act or acts as shall be inconsistent with this act, shall be repealed, except so far as the said acts or parts of acts or any of them whether mentioned or included in the said schedule or not, repeal any former act or part of an act, and except, also, so far as may be necessary for the purpose of supporting any proceedings taken or to be taken, under and after the commencement of this act upon any trading, act of bankruptcy, petitioning creditor's debt, or other proceeding in bankruptcy before the commencement of this act, and except as to the recovery and application of any penalty for any offence which shall have been committed before the commencement of this act.

Sect. 4. And be it enacted, that this act unless where otherwise specially provided, shall commence and take effect from and after the eleventh day of October next; and that from and after the commencement of this act no fiat in bankruptcy shall be issued, but all proceedings in bankruptcy or to found an act of bankruptcy shall, and proceedings for arrangement between debtors being traders liable to become bankrupt and creditors may, be by virtue of and according to the provisions of this act; and that all proceedings in bankruptcy, and every fiat in bankruptcy, and petition for such arrangement, depending at the commencement of this act, shall proceed in and brought to a conclusion under the provisions of this act: provided that every trading, act of bankruptcy, petitioning creditor's debt, or other matter or thing, which before the commencement of this act would have authorized proceedings in bankruptcy, shall after the commencement of this act be sufficient to authorize proceedings in bankruptcy under this act, and nothing in this act contained shall render invalid any proceedings in bankruptcy, or any fiat in bankruptcy, or any petition for arrangement, depending at the commencement of this act, or any proceedings which may have been instituted or taken under or by virtue of such bankruptcy fiat or petition, or lessen or affect any right, title, claim, demand, or remedy which any person now has, or hereafter may have, under or by virtue thereof, or lessen or affect any right, title, claim, demand, or remedy which any person now has, or hereafter may have, upon or against any bankrupt against whom any fiat has, or shall have been issued, or against any such trader who may or shall have presented such petition except as in this act is hereafter specially provided: provided always, that nothing in this act contained, shall affect the provisions of the Joint-Stock Companies Winding-up Act, 1848, or any of the acts therein recited, or of any act amending such act, except so far as regards the abolition of the fiat in bankruptcy and the substitution of a petition for adjudication of bankruptcy.

Sect. 233. That if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication) within twenty-one days after the advertisement of the bankruptcy in the *London Gazette* or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat, or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, or before the date and filing of the petition for adjudication, and that such fiat was

REG.  
v.  
SWAN.  
—  
*Fraudulent  
bankrupt.*

The evidence went to show that the offence alleged was committed before the 1st August, the time when the 12 & 13 Vict. c. 106, passed.

*James and Parry* (for the defendant) submitted that the indictment could not be sustained, inasmuch as it was framed upon the 5 & 6 Vict. c. 122, and that act was repealed by the 12 & 13 Vict. c. 106. After an act is repealed, things remain as though it never had an existence, and therefore, although when this offence was committed there was an act in being which made it penal, the court cannot now take cognizance of what has since been abrogated. In the schedule to the 12 & 13 Vict. c. 106, the 5 & 6 Vict. c. 122, is repealed with certain exceptions, but those exceptions cannot apply to this case, and the exceptions in the 1st section clearly apply only to civil proceedings under a bankruptcy, or to the recovery of a penalty for any offence committed before

sued forth or such petition filed on the day on which the same is stated in the *Gazette* to bear date.

Sect. 252.

Sect. 252. That if any bankrupt shall, after an act of bankruptcy committed, or in contemplation of bankruptcy, or with intent to defeat the object of the law relating to bankrupts destroy, alter, mutilate, or falsify any of his books, papers, writings, or securities, or make or be privy to the making of any false or fraudulent entry in any book of account or other document with intent to defraud his creditors, every such bankrupt shall be deemed guilty of a misdemeanor, and on conviction be liable to imprisonment for any term not exceeding three years, with or without hard labour.

Sect. 253.

Sect. 254. That any bankrupt, or bankrupt's wife who shall upon any examination upon affirmation or after making and signing the declaration authorized or directed by this or any other act relating to bankrupts, and any person who shall, upon any examination upon oath or affirmation, or in any affidavit or deposition or solemn affirmation so authorized or directed, or in any affidavit or deposition, or solemn affirmation wilfully and corruptly give false evidence or wilfully and corruptly swear or affirm anything which shall be false, being convicted thereof shall be liable to the penalties of wilful and corrupt perjury.

#### SCHEDULE A.

##### Acts and parts of acts repealed.

Schedule.

Date of Act.	Title.	Extent repealed.
6 Geo 4, c. 16.....	An Act to amend the Laws relating to Bankrupts.	The whole.
5 & 6 Vict. c. 122	An Act for the Amendment of the Law of Bankruptcy.	The whole, except as herein before, in the Bankrupt Law Consolidation Act, 1849, is excepted so far as the act repeals any other act or acts or any part of any other act or acts and except so far as relates to the appointment, tenure of office, and removal of additional commissioners, deputy registrars, and official assignees to act in the country, except so far as relates to the salaries of commissioners, and except so far as relates to the transfer of the duties and business of the clerk of enrolments to the registrar of the court acting in Basinghall-street, and except so far as relates to retiring annuities and allowances, and except so far as relates to the allowances of travelling and other expenses to the commissioners and deputy registrars.

the commencement of the act. That means a pecuniary penalty which has been imposed but not recovered, and there are several penalties denounced against certain proceedings by the 5 & 6 Vict. c. 122, to which such words will apply? [COLERIDGE, J.—But is there not a similar section in the 12 & 13 Vict. c. 106, to that in the 5 & 6 Vict. 122?] I admit that there is. [COLERIDGE, J.—Then how can you say that the indictment is necessarily framed upon the 5 & 6 Vict.; why not under the later statute? On the face of the indictment there is nothing to show under what statute it is drawn.] I submit that if the indictment is framed under the new act, then it must clearly fail, because that statute was not in force when the offence was committed. In 1 Hale's Pleas of the Crown, it was laid down in an analogous proceeding that, "Touching the 2nd clause of repeal by the 1st Mary, that discharged all offences committed before that repeal against the statutes repealed if it had not been specially provided to the contrary by the proviso of this act touching persons formerly indicted." This clearly shows that, after a statute is repealed, no proceeding could be taken against a person for an offence committed whilst it was in operation.

REG.  
v.  
SWAN.  
—  
*Fraudulent  
bankrupt.*

*Clarkson* (*Huddleston* with him) for the prosecution, contended that the statute, 12 & 13 Vict. c. 106, must be taken to keep alive the punishment awarded to the offence in question by the former act. The moment one act was repealed, the other, containing similar clauses (as far as this charge was concerned) came into operation. So that there never was the smallest period of time when the acts alleged against the defendant were not punishable by force of legislative enactment. It never could have been the intention of the Legislature to give impunity to offenders and make exceptions in a class of people whom it has still made severely punishable. Taking the whole statute together, it was obviously intended that the repeal should not extend to, lessen, or alter, the effect of anything that had been done under the old act. It only sought to regulate the mode of proceeding in future cases. This is clear from the wording of the 4th section. It declares that nothing in the act contained shall render invalid any proceedings in bankruptcy, or lessen or affect any right, title, claim, demand, or remedy which any has or may have against any bankrupt against whom any fiat has issued. Again, that section declares that fiats shall be abolished, and yet, on reference to the 233rd section, there will be found a provision for cases in which the bankrupt shall not, within twelve months of the advertisement of the bankruptcy in the *Gazette*, have taken some proceeding to annul the fiat, thus contemplating the existence of such fiats as were in being at the time the act passed. It has been said that the words in the 1st section, "any penalty for any offence," refer merely to a pecuniary penalty, but this is not so. A penalty in its ordinary signification means a punishment, and in this very act the word is so used; for, in the 254th section it is declared that any bankrupt giving false evidence shall be liable to the penalties

Argument of  
*Clarkson* for  
the crown.

REG.  
v.  
SWAN.

*Fraudulent  
bankrupt.*

Judgment of  
Coleridge, J.

of wilful and corrupt perjury; that obviously refers to imprisonment as well as fine, and if so, why should not the same construction be put upon the same word in the 1st section?

COLERIDGE, J.—My mind is entirely free from any doubt in this case, and I think that the indictment cannot be sustained. If it could be supported at all, it could only be under the 5 & 6 Vict. c. 122, because it was under that statute that the acts charged were committed, and there are no retrospective words in the 12 & 13 Vict. c. 106. Then, is the 5 & 6 Vict. c. 122, so entirely repealed that it is impossible to have recourse to it? I think it is. The 1st section declares that, from and after the commencement of this act, the several acts set forth in the schedule shall be repealed. Let us then turn to the schedule and we find that the whole of the 5 & 6 Vict. c. 122, is repealed, except certain parts which it is admitted do not bear upon this question. Therefore, if it stood simply on the words in the schedule, all doubt would be at an end. But it is said that there are other parts of the act which have a saving effect. The 1st section repeals, except so far as may be necessary for the purpose of supporting any proceeding taken or to be taken upon any trading, act of bankruptcy, petitioning creditor's debt, fiat or other proceeding in bankruptcy before the commencement of this act. These words evidently show that the exception has reference to proceedings strictly in bankruptcy, and has no allusion to such a case as this which is a merely collateral proceeding. Then there are the words "except as to the recovery and application of any penalty for any offence." No one, reading these words as a lawyer would read them, could believe that they were intended to meet the case of an indictment such as this. They evidently refer to summary proceedings under which a pecuniary sum is awarded to be paid as a punishment. The 254th section is referred to to show that the word "penalties" is used in a larger sense. But it does not follow that we are bound to put the same meaning on the word penalty in the 1st section, where the context so clearly restricts it. It is said that the 4th section shows an intention on the part of the Legislature to keep alive proceedings of this nature. But, supposing we were satisfied that the framers of this act never contemplated such a view as is contended for by the defendant, still we cannot create or punish crimes except on the express words of the Legislature. I do not think that any inference favourable to the prosecution is to be drawn from the two sections last mentioned; whatever saving operation they may have is, in my opinion, restricted to bankruptcy proceedings strictly so called, and certainly cannot extend to criminal ones. I think the defendant must be acquitted.

Judgment of  
Kelle, B.

ROLFE, B.—I so entirely concur in the view my learned brother has expressed, that I do not think we ought to reserve the point for any further discussion. I think it perfectly clear that, when a statute is repealed *simpliciter*, you cannot afterwards proceed against a person for anything done under it. I desired to have handed up to me Sir Robert Peel's Acts, and I find a vast

number of statutes, constituting certain offences, were by them repealed, and new acts substituted; in all of them I see that the acts are repealed from a certain day except as to offences committed before the repeal, and which are to be dealt with as though the repeal had not taken place. I presume that was only done because the Legislature thought such a provision necessary. I recollect on the passing of the 6 Geo. 4, c. 16, the same point occurring: that act repealed all former ones, and the same argument was used that it could not be intended to give impunity to those who had committed offences under the old act, and which were still rendered penal by its successor. Some of those offences were capital ones by the old law, but the punishment of death was repealed by the 6 Geo. 4, c. 16, and if the principle now contended for had been upheld, a man might have been hanged at a time when a statute was in force which declared that such a punishment should not be awarded. It might be by mistake that the new act did not contain such a provision as I have mentioned, but it very positively repeals all that has gone before, and it is much safer to adhere to what the Legislature enacts than to speculate on what it intended. The defendant must be acquitted.

*Clarkson and Huddleston* for the prosecution.

*James and Parry* for the defence.

See the next case.

REG.  
v.  
SWAN.  
—  
*Fraudulent  
bankrupt.*

## CENTRAL CRIMINAL COURT.

*January 9, 1850.*

(Before PATTESON, J., and TALFOURD, J.)

REG. v. NAIRNE.(a)

*Fraudulent bankrupt.*

THE prisoner was indicted for that he, having been adjudged a bankrupt, feloniously did neglect to surrender himself on the day limited for his surrender.

As this case involved precisely the same question as was decided in *R. v. Swan*, *supra*, an acquittal was about to be taken, when

*Bodkin* (with whom was *Huddleston*), for the prosecution, stated that a point with respect to this act of Parliament had occurred to him on which he thought it right to take the opinion of the court. By the schedule A. attached to the act, it appeared that the

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.



REG.  
v.  
NAIRNE.  
—  
*Fraudulent  
bankrupt.*

6 Geo. 4, c. 16, was wholly and absolutely repealed. On referring to this last-named statute, it would be found that it repealed the 5 Geo. 4, c. 98, which had the same penal clauses in it as were contained in the later acts. The effect, therefore, of the repeal of the 6 Geo. 4, c. 16, would be to revive the 5 Geo. 4, c. 98, and under that statute this indictment might be supported. It might be contended that that repeal in the schedule was not a total and absolute repeal, but one qualified by the proviso contained in the 1st section. But it was somewhat remarkable, if this were the view intended to be taken, that in the same schedule where other acts were enumerated—for instance, in the 5 & 6 Vict. c. 122—there were express reservations. The question, therefore, simply was, whether the words in the 1st section were sufficiently clear to indicate the intention of the Legislature to except from the repeal those parts of the acts which repealed former ones.

Judgment of  
Patteson, J.

PATTESON, J.—I do not think you can avail yourself of this argument, because the 1st section says in express words that the acts mentioned in the schedule shall be repealed except so far as they repeal any former acts. With regard to the 6 Geo. 4, c. 16, the schedule, it is true, says that the whole shall be repealed, but your argument would go to show that that expression in the schedule is to do away with the exceptions expressly enacted in the 1st section. With reference to the 5 & 6 Vict. c. 122, mentioned in the schedule, it is said that the whole is to be repealed with certain specified exceptions, and amongst them is the very exception which is contained in the 1st section; therefore, you argue that wherever that exception is intended to be applied to the particular act of Parliament mentioned as repealed in the schedule, it is at the same time there expressed. But you will find that, although a fair observation to make, this is in truth no argument at all. I can easily account for that expression which is put into the schedule with respect to 5 & 6 Vict. c. 122. It was not intended that that act should be wholly repealed, but certain parts of it were to be excepted. These it was necessary to mention, and having specified certain exceptions, it was thought right to add this one, although it had been already provided for. It had better not have been there, because these things lead to discussion and argument, but being there it does no harm. The exception in the 1st section must have its full operation, and I think, therefore, that the statute 5 Geo. 4, c. 98, is not revived.

TALFOURD, J., concurred, and the prisoner was acquitted.

COMMISSION OF OYER AND TERMINER, AND  
GENERAL GAOL DELIVERY FOR THE  
COUNTY AND CITY OF DUBLIN.

OCTOBER SESSION, 1848.

October 28.

(Before TORRENS and CRAMPTON, J.J.)

REG. v. CHARLES GAVAN DUFFY. (a)

*Prisoner—Practice—Indictment—Jurisdiction.*

*At a session of the court, held in August, 1848, a bill of indictment was found against the prisoner, by the grand jury of the county of the city of Dublin, for offences committed therein; at the next session, in the October following, before the indictment was proceeded on, the Attorney-General, under the provisions of the statute 6 Geo. 4, c. 51, sent up a fresh bill against him, for the same offence, to the grand jury of the next adjoining county, which was found a true bill, and obtained an order that the first indictment be quashed, and obtained a writ of habeas corpus to transfer the prisoner from the custody of the sheriff of the city to that of the county sheriff.*

*Held, that the words "any prosecutor" in the 3rd section, being large enough to embrace prosecutions at the suit of the crown, the second bill of indictment was regularly preferred in the next adjoining county. But that the prisoner could not then be compelled to plead to it, the habeas corpus to transfer him to the custody of the county sheriff not having issued, pursuant to the 6th section of the act, ten days before the holding of the sessions.*

AT the preceding August session of the court, an indictment was found against the prisoner by the grand jury of the county of the city of Dublin, for compassing to depose the Queen, and for compassing to levy war against her.

This indictment was not then proceeded on, and at the present session of the court a bill was, under the provisions of the statute 6 Geo. 4, c. 51, sent up to the grand jury of the county of Dublin, charging Mr. Duffy with the same offence, and having been by them found a true bill, on motion by the Attorney-General, the indictment which had been found against him in the city was quashed, and a *habeas corpus* issued, signed by Torrens and Crampton, J.J., the presiding judges, for the removal of the prisoner from the custody of the city sheriff to that of the sheriff of the county of Dublin, in order to his being tried in the latter jurisdiction, and now the prisoner, having been called on to plead

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

Judgment of  
Torrens, J.

to the latter indictment, he by his counsel objected to plead to it, on the ground that the provisions of the 6 Geo. 4, c. 51, had not been complied with, the *habeas corpus* not having been issued ten days before the first day of holding the sessions of the court; his counsel also moved to quash the county indictment. These applications were resisted on behalf of the crown. The other circumstances of the case are sufficiently stated in the judgment.

TORRENS, J.—In this case, which is an application made on behalf of the defendant, Charles Gavan Duffy, by his counsel, substantially amounting to this, that the defendant should, in point of fact, not be removed from the custody of the sheriff of the county of the city of Dublin, to the custody of the sheriff of the county of Dublin, inasmuch as the provisions of the statute 6 Geo. 4, c. 51, had not been observed,—whatever may be the result of that application, or the rule which the court may pronounce, it is not for the court to pronounce on the course to be taken. It appears from the return of prisoners in the custody of the sheriff of the county of the city of Dublin, that the prisoner was committed on the 8th of July in this year, and that he has remained up to the present time in the custody of the sheriff of the city of Dublin, and that at a previous commission his case was inquired into by the grand jury of the city, and bills found against him for the same offence as has been made the subject of a bill of indictment which has been sent up against him, and found, at the present commission by the grand jury of the county, the indictment previously found against him by the city grand jury having been quashed, so here we have him in the custody of the city sheriff, there being no charge now against him in the city, but it is sought to remove him to the custody of the county sheriff, in order that he may be tried at the present commission, upon the bill found against him by the county grand jury. It is contended that, under the statute to which I have alluded, the defendant ought to have had the legal notice, prescribed by the statute, of the place at which it was intended by the prosecutor that he should be tried, provided it was the intention of the prosecutor to change what is called the venue, and it being the intention of the prosecutor to do so, accordingly, in the exercise of that authority given by the statute, a writ of *habeas corpus* was obtained, and was served on the city sheriff, to bring up the prisoner, in order to transfer him to the custody of the sheriff of the county, and when the prisoner was called on to plead, he objected that he had not received the notice to which he was entitled. That, I believe, is a correct history of the facts of this case. On the first perusal of the statute, it struck me that its provisions had not been fulfilled, and that they were wise and wholesome provisions, guarding on the one hand the security of the subject, and on the other the interests of the public. As it is a case upon which there is no authority, we have come prepared to state the reasons upon which my learned brother and I have decided that the custody of the prisoner in this case cannot be

changed. It is to be remarked, that this is a provision of a statute in derogation of the common law, which ordains that a prisoner ought to be tried in the jurisdiction in which the offence has been committed; and when special reasons exist for the alteration of these provisions of the common law, it is my opinion that the statutable provision ought to be strictly pursued, because it must be plain to every legal mind, that when the Legislature interferes to alter the course of the common law by statutable provision, and when they annex conditions to the change of jurisdiction, the reasons which induced them to make the alterations arise out of the precautions which they have taken to render the case similar in its advantage to the common law of the land; therefore I annex a much greater authority to these statutable guards which the Legislature has made; and, looking at these provisions, I attach weight to the necessity for ten days' notice of an intention to proceed in another jurisdiction being given to all parties concerned. You find the prisoner in the custody of a particular authority from the 8th July until the 26th October, and what is still stronger in this particular case, you find that authority sanctioned by a bill having been sent up against him before that jurisdiction. The prisoner had no reason to suppose that he would be tried before any other jurisdiction. The first intimation which the defendant has of the intention of the prosecutor is the service of the writ of *habeas corpus* upon the city sheriff. Now let us see, upon the whole purview of the statute, whether the Legislature has not taken care that no party concerned, either in the prosecution or the party accused, can be taken by surprise; and it is remarkable that they have given the same notice of ten days to the three classes of parties—the magistrates who have taken the information, the witnesses who are under the recognizances to appear and give evidence, and the persons who are accused. I shall briefly advert to the provisions of the statute. The 6th section enacts, that it shall and may be lawful for any of the judges of His Majesty's Court of King's Bench in Ireland, or any of the justices of Oyer and Terminer or General Gaol Delivery for any such next adjoining county, as aforesaid, upon the application of any prosecutor or prosecutors ten days next before the holding of any sessions of Oyer and Terminer or General Gaol Delivery for such last-mentioned county by proper writs of *habeas corpus*, which they are hereby empowered and authorized to issue, to cause any person or persons who may be in the custody of any sheriff or sheriffs or of the keepers of any gaol or prison charged with any offence or offences committed within any county of a city, county of a town or town corporate, to be removed into the custody of the sheriff of such next adjoining county, in order that such person or persons may for such offence or offences as aforesaid be tried in such last-mentioned county. In my opinion it is both directory and mandatory that these preliminaries should be complied with. If there is any case in which the provisions of a statute ought to be strictly complied with, it is a case where the life or

REG.  
v.  
DUFFY.

Indictment—  
Jurisdiction—  
Practice.

Judgment of  
Torrans, J.

REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

liberty of a prisoner is concerned. Of the cases provided for by the statute the case of a prisoner is the stronger case, for the other parties might, if punished without having received notice of the change of jurisdiction, have some redress, but it is questionable whether any tribunal could relieve the prisoner: he might have no redress if he was convicted. Now, before I proceed further in my comments on this statute, let me observe that the Legislature provides wisely, I think, that there shall be an authority not sitting at Oyer and Terminer which shall have the power of issuing an order to transfer the prisoner from one jurisdiction to another. It is not the Court of King's Bench alone, but any of the judges of the court who is empowered to issue the *habeas corpus* so as to enable the party to have due notice that the jurisdiction shall be changed. It appears to be the desire of the Legislature to provide a proper tribunal, from which a proper writ shall issue. [His Lordship here read the first clause of the 6th section of the act.] Where I find this provision I think it must mean to give the prosecutor notice of the proper tribunal at which he may sue out a proper writ. No doubt the writ is issued that the prisoner may be tried in another jurisdiction. That is the ultimate result, and there is no notice to the prisoner himself specified by the act, but the service of the *habeas corpus* on the officer (who is to receive him,) is tantamount to a committal, which would be void unless it specified the jurisdiction in which the prisoner was to be tried. Therefore, I take it that it is not necessary that there should be a personal service on the prisoner, but that a service of the writ on the officer is abundant notice. In this case the dates establish this fact—that up to the date of the issuing the *habeas corpus* and the quashing of the previous indictment and finding of the new bills, the prisoner had no notice of an intention to transfer him to another jurisdiction. Could it then be said, that if the prisoner was really unapprized of the facts, he might not have been unprepared for his trial? and these facts illustrate the wisdom of the provision of the Legislature. The first class of persons who are to have ten days' notice are the witnesses who are bound to appear at the trial, and are liable to a pecuniary penalty if they do not come forward. Are they to fall under the pecuniary penalty if they have not had the ten days' notice? Could their recognizances be estreated? The next case is applicable to the committing magistrates. Are both liable without having received notice of the change in the jurisdiction? The section of the statute upon which I rely is the 6th section, upon the whole of which, without going into nice matters of reference from passages in the act, the judgment of the court is that the prisoner be not removed from the custody of the former sheriff (the city sheriff.)

Judgment of  
Crampton, J.

CRAMPTON, J., after having referred to the facts of the case, proceeded to say:—The present motion and the aspect of things grows out of the position in which the judges sit here. We are commissioners here for the city of Dublin, with the Lord Mayor,

and we are commissioners for the county of Dublin under another commission, and we sit under both commissions at the same time, and at the same place. The defendant having been indicted (in the county) there was a motion made before us yesterday by his counsel to quash the indictment, and also another motion to which my brother Torrens has referred. The first motion is one which could by no means be acceded to. One of the grounds on which the motion to quash the indictment was put was, that the Attorney-General was not on the same ground as other prosecutors. Now it would seem to me to be very startling that the chief prosecutor of the country should not be included by the act. But the 3rd section of the act naming "any prosecutor," would seem to put an end to that objection; the power of sending up an indictment to the next adjoining county is given by the 3rd section to "any prosecutor," and therefore it would be impossible for us to quash the indictment. The other motion is one which involves a much nicer question. It is, that the prisoner shall not be removed from the custody of the city sheriff for the purposes of trial. That is tantamount to calling on the court not to allow the execution of the *habeas corpus* which was signed by myself and my learned brother on the 26th of October; the *habeas corpus* was signed by myself and my learned brother under the impression that we were signing the *habeas corpus* under ordinary circumstances, and not that we were signing a *habeas corpus* under the statute. Undoubtedly the statute gives a benefit to prosecutors, it gives them a power which they had not at common law—of electing one of two jurisdictions in which to bring their prosecution. By the 3rd section power is given to any prosecutor to originate his prosecution in an adjoining county if he pleases. That is the whole provision; it makes no provision as to the trial. Then comes the 4th section, giving, not to the Queen's Bench, not to the commissioners for the adjoining county, but "to any court of Oyer and Terminer, or Court of General Gaol Delivery, for any county of a city, county of a town, or town corporate," a power to remove an indictment from the city to the next adjoining county for trial and to order the prisoner to be removed, and it is an authority to be exercised only by the commissioner sitting in the local jurisdiction. It is remarkable that where power is given to remove a prisoner a provision is made as regards the recognizances of the witnesses and prosecutors, and the examinations and depositions, and the statute seems to contemplate that the trial is to take place at a future time and not at the (then) present sittings. On this particular section we have an authority in the case of *Rex v. Trenor*, mentioned in Mr. Hayes's very accurate work (p. 908), and reported in 1 Crawford & Dix's C. C. (p. 237), in which our late venerable brother Burton made an order for removing a proceeding from Drogheda to the county of Meath, the trial to take place at the next session; but that is not an authority upon the 6th section. It is manifest that it is under the 6th section this application is made, and it is under that section that it has been put by Mr. Attorney-

REG.  
v.  
DUFFY.

Indictment—  
Jurisdiction—  
Practice.

Judgment of  
Crampton, J.

REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

General and Mr. Smyly on behalf of the crown. I think a fair test to try whether our *habeas corpus* was granted advisedly or unadvisedly is to see what power a judge of the Queen's Bench has in such case, for whatever power a judge of the Queen's Bench has, a commissioner can have no more. The power of a judge of the Queen's Bench is limited in point of time to issuing a *habeas corpus*, so that the prisoner may have ten days' notice of removal. If a judge of the Queen's Bench has not the power to remove a prisoner unless ten days shall elapse before the prisoner shall be brought to trial, a commissioner has not. That appears to me to be the true construction of the act of Parliament. It appears to me to apply to persons in custody and to persons not in custody. The section next applies to the case of an indictment found or to be found, and a clause of the section contains a provision to this effect: "That the said Courts of Oyer and Terminer and General Gaol Delivery" shall have a power to issue process to apprehend a person who is not in custody. If the prisoner is in custody here, he is in the custody of the city sheriff; and it appears, as my brother Torrens has very clearly stated, to be necessary that a notice of ten days to appear and prosecute shall be given to the witnesses to enable them to attend, and it also appears to me quite clear that a notice of ten days to the prisoner is necessary in order that a trial may be had at the next sessions; there is nothing unreasonable in the prisoner receiving notice of the change. It rather seems to me, to be unreasonable to be hard upon a prisoner that he should not have notice of the change of jurisdiction; therefore, under all the circumstances of this case, it appears to me that justice will be in all respects satisfied if Mr. Duffy be now transferred: there being no charge against the prisoner in the city he must be either discharged or transferred; if the *habeas corpus* is now allowed, and the prisoner is transferred to the sheriff of the county, the trial may be postponed till next commission.

COMMISSION OF OYER AND TERMINER, AND  
GENERAL GAOL DELIVERY FOR THE COUNTY  
OF DUBLIN AND THE COUNTY OF THE CITY OF  
DUBLIN.

(Before PERRIN, J., and RICHARDS, B.)

DECEMBER SESSION, 1848.

*December 16 and 18.*

REG. v. CHARLES GAVAN DUFFY. (a)

*Indictment—Practice.—Changing the venue from a city to the adjoining county, and afterwards resorting again to the city jurisdiction—Statute 6 Geo. 4, c. 51.*

*An indictment having been found against the prisoner by the grand jury of the county of the city of Dublin, at the August session of the court, which bill was not further proceeded on, the Attorney-General, under the provisions of the statute 6 Geo. 4, c. 51, preferred another bill against him for the same offence to the grand jury of the next adjoining county, and the indictment found in the city was quashed, but notice of the change of jurisdiction was not served as prescribed by the statute.*

*Held, that the Attorney-General was not prohibited, by having indicted the prisoner in the county, from again resorting to the city jurisdiction, and preferring another bill therein for the same offence.*

*But semble, that in such case the court will not allow both bills to continue pending against the prisoner.*

ON the 8th of July, 1848, the prisoner was arrested and committed to Newgate upon a charge of having feloniously compassed to deprive and depose Her Majesty, and to levy war against her, and having expressed such felonious compassing by publishing certain printings in a public newspaper called *The Nation*, of which he was the proprietor. The charge was grounded upon the sworn informations of John Hawkesley, Martin Reilly, and Charles Vernon, Esq., (Registrar of Newspapers at the Stamp-office), who were bound over by recognizance to attend and give evidence against the prisoner. At a session of Oyer and Terminer held on the 8th of August following, a true bill was found by the grand jury of the county of the city of Dublin, charging him with the above offences; upon this indictment the law officers of the crown did not proceed at that session, and at the ensuing session, which took place in October following, a bill for the same offences was sent up against the prisoner to the grand jury of the county of Dublin, before whom Hawkesley, Reilly, and Vernon, attended. This having been found a true bill by the grand jury, the first indict-

(a) Reported by W. ST. LEGER BABINGTON, Esq. Barrister-at-Law.



REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

ment was quashed by the court upon the application of the Attorney-General. A writ of *habeas corpus* issued at the instance of the Attorney-General to remove the prisoner from the custody of the sheriff of the city to that of the sheriff of the county of Dublin. But the prisoner having been brought up to the bar in the custody of the city sheriff, and being about to be arraigned upon the indictment found in the county (the judges sitting at the same time under commissions for both the county and city of Dublin), it was objected on his behalf, that he could not then be called on to plead, or be removed to the custody of the county sheriff, the *habeas corpus* for his removal not having issued ten days previous to the day for holding the session. This objection was held valid by the presiding judges (Torrens and Crampton, J.J.), and the prisoner accordingly remained in the former custody (see p. 120, *ante*.) and at the conclusion of the session applied to be discharged from the custody of the city sheriff, there being no charge against him in the city. This application, which was opposed by the Attorney-General, the court refused. At the present session (December, 1848), a bill was again sent up against the prisoner for the same offence to the grand jury of the county of the city of Dublin, and found by them a true bill. An affidavit was made by the crown solicitor, which stated that the indictment in the county was not proceeded on in consequence of newly-discovered evidence, and that no notice of the intention of the crown to remove the indictment to the county had been served on the persons who had been bound over to appear and give evidence, and that the informations and recognizances which had been returned to the clerk of the crown in the city, on the 10th of July last, had not been removed from his custody to the county jurisdiction.

Butt, Q. C., for  
the prisoner.

Butt, Q. C., on behalf of the prisoner, now moved that the new indictment found in the city be quashed. The question in this case arises upon the construction of the statute 6 Geo. 4, c. 51, the 3rd section of which provides "That it shall be lawful for any prosecutor to prefer his bill of indictment for any offence committed within any county of a city, &c. in Ireland, to the jury of the next adjoining county, &c., sworn and charged to inquire, &c. for such county of a city." The statute does not expressly direct the proceedings to be transferred to the county, but that in England it is the constant practice, and it is assumed that such a transfer takes place, as appears from *Reg. v. Mellor* (R. & R. 144), and it would appear to be so by necessary implication, for the 6th section provides that the prisoner shall be transferred by *habeas corpus* to the custody of the sheriff of the next adjoining county, and that the court may compel the attendance of witnesses and prosecutors there; and the 7th section provides that the recognizances entered into by witnesses shall be forfeited in case of non-attendance, if, ten days previous to the holding of the next court of Oyer and Terminer, they shall have received notice of the prosecutor's intention to remove the indictment into the county; and the 8th section provides, that if the notice be left

at their place of abode it shall be sufficient, and that if thereupon the witnesses attend in the county, their recognizances shall be discharged. That is for the benefit of the prosecutor and witnesses, and it may be waived by the attendance of the witnesses without notice. The 9th section provides that "after the delivery of any of the said notices, it shall not be lawful for any person or persons to prefer any bill of indictment, or to return any inquisition for any offence mentioned in the said recognizances, &c., at or to any sessions of Oyer and Terminer or General Gaol Delivery for any such county of a city," &c. Therefore, when once a prosecutor has made his election, and proceeded in the county, the proceedings cannot be brought back again to the city. This clause was enacted to prevent proceedings being transferred backwards and forwards, which might be made an instrument of great oppression: (*Reg. v. Trenor*, 1 Cr. & Dix C. C. 237; *Hayes Cr. L.* 908.) In this case there are indictments pending against the prisoner both in the county and city, which might be most injurious to a prisoner, for, as it was suggested in the case of *Reg. v. Trenor*, which was an indictment for libel tried in the county of the town of Drogheda, there being two judges sitting at Drogheda, and at the same time two others sitting at Trim, in the next adjoining county, could it be contended that the prisoner should be exposed to the hardship of simultaneous proceedings at both places? In the present instance, recognizances have been entered into by Hawkesley and Reilly, and the prosecutor has made his election. [PERRIN, J.—Does not the 9th section of the statute raise the very serious question whether the Queen is bound by it? It appears to me that there is not any case where the Queen can be considered to come under the description of "person."] The 2nd section of the act provides, that it shall be lawful for the court, at the prayer or instance "of any prosecutor," &c. The word "prosecutor" must be taken to include the Attorney-General prosecuting on behalf of the crown, and he must also be taken to come within the meaning of the word "person." [PERRIN, J.—What are the facts which bring this case within the 9th section of the statute?] The case, if not within the express words of the act, is clearly within the spirit of it; for, although notices may not have been served on the witnesses to secure their attendance in the county, yet, if they attend there without notice, their recognizance is discharged, and it is the prosecutor's duty to have these notices served, and the informations returned. If, then, he does not do what it is his duty to do, can he therefore go back to the city, and obtain an advantage which he would not otherwise be entitled to?

The *Attorney-General* (Monahan) contra.—There is no ground in this case to oust the jurisdiction of the city court, nor to prevent the prosecutor preferring his bill of indictment within that jurisdiction; the prisoner, having been arrested in July, has remained in the custody of the city sheriff up to the present time; a true bill was found against him in the city at the August session

REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

The Attorney-  
General for  
the Crown.

REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

The Attorney-  
General for  
the Crown.

of the court, but no steps were taken under the statute to transfer the proceedings or change the venue, and that bill was afterwards quashed, owing to the discovery of a letter which it was considered advisable to insert in the indictment. It appears from the crown books, that (without notice to the committing magistrates or to Mr. Duffy) at the October session, a bill was found against him in the county of Dublin, and a *habeas corpus* applied for to remove him to the custody of the county sheriff, and the reason of this course has been stated on affidavits by the crown solicitor, merely to show that it was not done to harass or annoy Mr. Duffy. The application which was made to change the custody from that of the city to the county sheriff was refused, and he was left in the city, and another bill having been found against him in the city, he now moves to quash that indictment. There are cases in which bills may be found in one of several counties, as in the case of a larceny committed on a coach travelling through several counties, and the pendency of a bill in one county would be no answer to an indictment for the same offence in another, though I do not mean to contend that the court would not have jurisdiction to prevent a prisoner from being annoyed by such a course. It is not pretended that there is anything in terms in the statute rendering it improper or illegal to prefer this bill. It cannot be pretended that the Attorney-General is a person who is liable to give security for costs. The provisions of the 9th section of the act, "that after the delivery as aforesaid of any of the said notices, it shall not be lawful for any person or persons to prefer any bill or bills of indictment, or to return any inquisition for any offence or offences mentioned in the said recognizances, or any of them, at or to any session of Oyer and Terminer or General Gaol Delivery, for any such county of a city, or county of a town, or town corporate," apply to another case altogether, where notices have been served under the statute; and there is no provision in the act, that if a bill be found in one jurisdiction, a fresh one cannot be preferred in a different jurisdiction. I submit that there is nothing in the act to prevent a private prosecutor from proceeding in the jurisdiction in which the offence has been committed, much less the crown. A bill was sent up in the county, it having been objected in a former case (*Reg. v. Martin*, 3 Cox C. C. 318), that burgesses were incompetent to act as jurors in the city; but though the objection was certified to be valid by very able counsel, the Court of Queen's Bench having, on a writ of error, held differently (*Martin v. The Queen*, 3 Cox C. C. 319), we thought it was the more constitutional course to send up a bill against the prisoner in the jurisdiction in which the offence was committed. But even if a private prosecutor had served notices regularly under the statute of his intention to proceed in the next adjoining county, that would not bind the crown, who might take up the prosecution; it may often happen in England, where private prosecutions are more general, that the crown interferes and takes up the conduct of the case. [PERRIN, J.—Though the crown is not bound by a statute, yet

if it takes advantage of it, is it not obliged to conform to its provisions?] In *The Attorney-General v. Wilson* (Jebb C. C. R. p. 313), a recognizance having been entered into for the execution of public works, the Attorney-General proceeded by a civil bill. From the decision there was an appeal, and the judges held that the provisions of the statute, requiring security for double costs, did not apply to the crown, which shows that, though the crown may avail itself of part of the provisions of an act of Parliament, it is not bound to adopt all the others. The 9th section of this act only applies to persons from whom recognizances have been taken, and I submit that this application is not within either the spirit or terms of the statute, and ought to be refused.

REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

*Napier*, Q.C., for the prisoner.—To contend that the crown is not within the 3rd section of the statute, and that the Attorney-General is not a prosecutor within its meaning, is a very extraordinary construction to put upon the statute. In July, a bill was sent up against Mr. Duffy in the city of Dublin: in October, a bill was sent up against him in the county, and the indictment which had been found in the city quashed. If, then, the prisoner had in July presented his petition under the Habeas Corpus Act, he would now be entitled to be discharged, more than two sessions having elapsed. It is conceded, that if the notices required by the statute had been served, it would not be optional with the prosecutor to go back again to the former jurisdiction. Then it would seem to be a strange construction to put upon the statute, that if a prosecutor has not given the notices required by the statute, he shall be at liberty to violate the other provisions of it. It is not from the serving of the notices, but the finding of the bill, the court derives authority. The words of the act are large enough to embrace the public prosecutor, and it is to be observed, a private prosecution is only carried on by the sufferance of the Attorney-General. It would be a very strange thing if the Attorney-General could go into every court of criminal jurisdiction which might at the time be sitting and prefer bills for the same offence. The Attorney-General might, if he had pleased, before the present commission, have obtained a transfer of the custody of the prisoner to the county. The case of *Rex v. Trenor* (1 Cr. & Dix. C.C. 237) was the case of a prosecution by the then Attorney-General, and if the words "any prosecutor" in the 4th section of the act, mean a public prosecutor, so do they in the 3rd section. This right of transfer was not given by common law, and there could be no reason why it should be given by the statute to a private and not to a public prosecutor. The words "any prosecutor" are as large as any words in the language well can be. The Attorney-General cannot rely on a departure from the provisions of the statute by the law officers of the crown as any ground on which to exempt themselves from the observance of its other provisions. Is the violation of an act of Parliament to be considered a sufficient argument for the interpretation of it in a manner injurious to the

*Napier*, Q.C.,  
for the prisoner.

R.E.G.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

prisoner? The court ought not to call on Mr. Duffy to plead to this indictment, but to quash it.

The *Solicitor-General* (Hatchell), in reply.—At the August session of the court it became the duty of the crown to postpone the trial in consequence of newly-discovered evidence. The trial was prevented taking place in October by the prisoner's counsel having raised the formal objection that the notices required by the statute had not been served, which objection was held a valid one by the court (see p. 120, *ante*.) The 1st section of the statute 6 Geo. 4, c. 51, makes use of the words "on motion made on behalf of His Majesty," and "on motion made on behalf of any prosecutor or defendant," thus taking a plain distinction between prosecutions by the crown and by private persons, and the crown is not intended to be bound by those parts of the statute where it is not named. If the construction of the 9th section, contended for by the prisoner's counsel, be adopted, there might be a failure of justice by collusion between the private prosecutor and the prisoner. If all the preliminary arrangements are completed, and the proceedings transferred, it is only under such circumstances that any objection to bringing back the case can be contended for; but if the case is not ripe for trial in the county jurisdiction, there is nothing to prevent the prisoner from being tried in the jurisdiction in which he is found; if the records have been removed—the informations and the recognizances—and the parties bound to attend have received notice of the transfer, it is only under these circumstances that there is a prohibition from sending up a new bill of indictment. If the argument urged on the part of the prisoner is well founded, a bill might be found in the county, the witnesses might not, if they were not served with notice, attend before the petty jury; and as by the act it is the *next* court at which they are bound to attend, they need not appear at any other, and there might be a total failure of justice if no bill could be preferred in the city. The county of Clare is the next adjoining county to Limerick. If a judge of assize at Ennis found upon the Crown Book a bill against the prisoner, he could not take any notice of it if the prisoner was not in custody in the county of Clare; and the prisoner being found in custody in Limerick, the judge there, who is bound to deliver the gaol, would ask why an indictment was not sent up against him. Would he listen to a statement that a bill had been found against him at Ennis, without also inquiring whether the requirements of the statute had been complied with? or could it be argued that the prisoner could not be tried in either county, for the witnesses would not be bound to attend at Ennis if notices had not been served upon them?

The Solicitor-  
General in  
reply.

December 18.

Judgment of  
Perrin, J.

PERRIN, J.—The prisoner having been called on to plead to an indictment found by the grand jury of the city of Dublin at this commission, charging him with the felony of compassing to depose

the Queen, and to levy war against Her Majesty, under the statute of last session, after he had obtained a copy of that indictment at the desire of his counsel, he moved by his counsel that the indictment be quashed, because, as he alleges, there is another indictment pending against him, charging the same offence found by the grand jury of the county of Dublin, at the last commission for the county, held in October, and which was preferred at the instance and directions of the Attorney-General, acting on Her Majesty's behalf, under the provisions of the statute of 6 Geo. 4, c. 51, to which he declined to plead, and objected to be then arraigned, and has not pleaded; and, it is insisted, that the statute obliges the crown to abide by that indictment or venue, and prohibits Her Majesty from preferring the bill, or any other for the same offence, in the county of the city of Dublin, and, therefore, that the present indictment ought to be quashed, and the Queen stopped from proceeding further upon it. The statute enables, in the 3rd section, any prosecutor to prefer his or her bill of indictment for any offence in any county of a city or town to the grand jury of the next adjoining county, and provides that, if it be found a true bill by that grand jury, it shall be as valid and effectual as if found by that of the city. It appears to me, that the Attorney-General had a right to have the bill preferred in the next adjoining county, and that the statute is merely an enabling and not a disabling statute (though I understand a question was raised upon the subject by one of the prisoner's counsel at the last commission); for though the King shall not be bound by a statute, unless specially named in it, yet he may take the benefit of it, though not named. It is so stated in several cases cited to that effect in the 11th Reports, 68 *a*. It was held that the King may take advantage of the statute of *Nisi Prius* though not bound by it; so also, the statute of *Magna Charta*, which provides that the Court of Common Pleas shall be held in some certain place, does not bind the King. In a case which was cited in the argument (*Rex v. Trenor*, 1 Cr. & Dix. C. C. 237), in which the point was raised, the Attorney-General was held to be "a prosecutor." The 4th section of the statute enables the court to transfer an indictment found in the county of a city, if it appears to the court that it is an indictment proper to be tried in the next adjoining county, and the court may, at the prayer either of the prosecutor or prisoner, order such indictment or inquisition, and the several recognizances and examinations relative to such indictment or inquisition, to be filed with the proper officer, and to be by him kept among the records of the Court of Oyer and Terminer of that county, and to cause the prisoner to be removed by writ of *habeas corpus* to the gaol of the next adjoining county, and the trial to take place as if the offence was committed there. The statute seems to provide for three cases. The 4th section, to which I have just referred, has no bearing in this particular case; nor indeed has the next. The 6th section provides that any judge of the Queen's Bench, or of the Court of Oyer and Terminer and Gaol Delivery

REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

Judgment of  
Perrin, J.

REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

Judgment of  
Perrin, J.

for the adjoining county, upon application made to him ten days next before holding the sessions for it, may cause the prisoners to be removed, by writs of *habeas corpus*, from the custody of the city sheriff to the custody of the sheriff of the county, in order to their being tried therein; and the County Court may issue process against the person charged, if he be not in custody, to compel him to come in, and for the attendance of the witnesses as if the offence was committed in the county. So far as I have read, there is no express prohibition against preferring or finding a bill in the city after one found in the county: the statute is plainly enabling—there is nothing disabling in it. It is plain, that, before the statute, it was not illegal to have a second bill found though another was pending for the same offence, though courts are bound to take care that a prisoner shall not suffer any injury by it: though generally improper, it has often been allowed. There are clear authorities establishing that the mere fact of the pendency of another indictment for the same offence is not sufficient ground for calling on the court to quash the fresh indictment. There is a case referred to in *The King v. Stratton* (Dougl. 239.) In *Rex v. Webb* (3 Burr. 1468, also reported in 1 Bla. Rep. 460), which is a clear authority on this point, the defendant was indicted for perjury, and the case having been removed by *certiorari*, stood for trial; in the meantime a new indictment was preferred, and the court held that it was not of course for the prosecutor to quash his own indictment; and finally, the rule made was, that the first indictment should be quashed, and the second stand in its place; and in another case, *Rex v. Swan and Jefferies* (Fost. Cr. L. 104), which was an indictment for murder, the trial was postponed, and in the meantime the Attorney-General, who had received orders to prosecute, was satisfied that Swan was in the service of the deceased, and considered it advisable to prefer another bill; the prisoner pleaded in abatement that another indictment was pending and over to the felony. The case was argued before Wright and Foster, Justices, and after argument, the court were of opinion that the charge in the bill last found must be answered, and that the pendency of a former indictment is no answer nor any reason why he should not plead to the last indictment notwithstanding the pendency of the former, for *autrefois arraign* is no plea in this case, and the King, by his counsel, must prosecute in such manner as will best answer the ends of justice; but at the same time they say that “the court must take care that the prisoner is not exposed to the inconvenience of undergoing two trials for the one offence.” In that case a second indictment had been prepared by the Attorney-General after another had been found: that is a decision on record, and it seems to me, that unless the law is altered, it is a strong authority in the present case, and that, as it is no plea to an indictment, so it is no ground for calling on the court to quash a fresh indictment. But it is insisted that the provisions of the statute distinguish this case, and that though before the statute it was

not illegal to have a second indictment found while another was pending, the law has been altered. So far as I have referred to the 3rd, 4th and 6th sections of the statute, I find nothing in it prohibiting a person who prefers a bill under the 3rd section from afterwards preferring a bill in the county of the city, and nothing invalidating or annulling that bill when found; no doubt he cannot proceed by both—no doubt the court will, in the exercise of its duty, take care to prevent any oppressive or vexatious use or abuse of the process. Here a bill has been found in the city, and pending that another appears to have been preferred in the county, under the authority of the 3rd section, not under the 4th or 6th sections, no order was made by the court under the 4th section, and the prisoner was not removed under the 6th, but objected at the last commission to be removed, and the court held the objection to be valid. Then it is contended that the 6th, 7th, 8th, 9th and 13th sections expressly or sufficiently prohibit the course which has been taken. The act directs that the recognizances of the prosecutors or witnesses, who do not appear after notice, shall be forfeited, and the 8th section makes notice being left at their abode a sufficient service; the 9th section enacts that the magistrates, before whom the informations were taken, shall, upon receiving ten days' notice, return the recognizances or examinations to the next Commission of Oyer and Terminer for the adjoining county, and that after the delivery of these notices it shall not be lawful to prefer a bill at the Sessions of Oyer and Terminer for the county of the city; and the 13th section enacts that such persons as remove an indictment to an adjoining county shall enter into recognizances in the sum of 40*l.* to pay the extra costs attending the prosecution in such next adjoining county. It is asserted that, by the latter clause of the 9th section, no one shall prefer a bill in the city, or remove a bill under this act after one has been found in the county. The enactment is not in these terms or to this effect; the provision is, that after the delivery of any of the said notices, &c., it shall not be lawful for any person to prefer any indictment in the county of the city: here it is expressly stated on affidavit that no notices were served, therefore this case plainly does not come within this enactment; the enactment is that, after the delivery of the notices, the indictment shall not be removed back. It has been argued, on behalf of the prosecution, that this enactment has been made to assist the prosecutor, not to restrain him from preferring an indictment; the provision operates, not after preferring or finding a bill, but after the delivery of the notices, which not having been delivered here, it does not apply; and it is further argued, that the Queen is not bound or intended to be bound by such provision, the word used being "person." Before the passing of this statute, it was not illegal, as I before have shown, during the pendency of a former indictment, to prefer another; so it seems inconsistent that we should, where there is no express provision in the act to that effect, restrain the Attorney-General from preferring a second bill of indictment in the place where the

REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

Judgment of  
Perrin, J.



REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

Judgment of  
Perrin, J.

for the adjoining county, upon application made to him ten days next before holding the sessions for it, may cause the prisoners to be removed, by writs of *habeas corpus*, from the custody of the city sheriff to the custody of the sheriff of the county, in order to their being tried therein; and the County Court may issue process against the person charged, if he be not in custody, to compel him to come in, and for the attendance of the witnesses as if the offence was committed in the county. So far as I have read, there is no express prohibition against preferring or finding a bill in the city after one found in the county: the statute is plainly enabling—there is nothing disabling in it. It is plain, that, before the statute, it was not illegal to have a second bill found though another was pending for the same offence, though courts are bound to take care that a prisoner shall not suffer any injury by it: though generally improper, it has often been allowed. There are clear authorities establishing that the mere fact of the pendency of another indictment for the same offence is not sufficient ground for calling on the court to quash the fresh indictment. There is a case referred to in *The King v. Stratton* (Dougl. 239.) In *Rex v. Webb* (3 Burr. 1468, also reported in 1 Bla. Rep. 460), which is a clear authority on this point, the defendant was indicted for perjury, and the case having been removed by *certiorari*, stood for trial; in the meantime a new indictment was preferred, and the court held that it was not of course for the prosecutor to quash his own indictment; and finally, the rule made was, that the first indictment should be quashed, and the second stand in its place; and in another case, *Rex v. Swan and Jefferies* (Fost. Cr. L. 104), which was an indictment for murder, the trial was postponed, and in the meantime the Attorney-General, who had received orders to prosecute, was satisfied that Swan was in the service of the deceased, and considered it advisable to prefer another bill; the prisoner pleaded in abatement that another indictment was pending and over to the felony. The case was argued before Wright and Foster, Justices, and after argument, the court were of opinion that the charge in the bill last found must be answered, and that the pendency of a former indictment is no answer nor any reason why he should not plead to the last indictment notwithstanding the pendency of the former, for *autrefois arraign* is no plea in this case, and the King, by his counsel, must prosecute in such manner as will best answer the ends of justice; but at the same time they say that “the court must take care that the prisoner is not exposed to the inconvenience of undergoing two trials for the one offence.” In that case a second indictment had been prepared by the Attorney-General after another had been found: that is a decision on record, and it seems to me, that unless the law is altered, it is a strong authority in the present case, and that, as it is no plea to an indictment, so it is no ground for calling on the court to quash a fresh indictment. But it is insisted that the provisions of the statute distinguish this case, and that though before the statute it was

not illegal to have a second indictment found while another was pending, the law has been altered. So far as I have referred to the 3rd, 4th and 6th sections of the statute, I find nothing in it prohibiting a person who prefers a bill under the 3rd section from afterwards preferring a bill in the county of the city, and nothing invalidating or annulling that bill when found; no doubt he cannot proceed by both—no doubt the court will, in the exercise of its duty, take care to prevent any oppressive or vexatious use or abuse of the process. Here a bill has been found in the city, and pending that another appears to have been preferred in the county, under the authority of the 3rd section, not under the 4th or 6th sections, no order was made by the court under the 4th section, and the prisoner was not removed under the 6th, but objected at the last commission to be removed, and the court held the objection to be valid. Then it is contended that the 6th, 7th, 8th, 9th and 13th sections expressly or sufficiently prohibit the course which has been taken. The act directs that the recognizances of the prosecutors or witnesses, who do not appear after notice, shall be forfeited, and the 8th section makes notice being left at their abode a sufficient service; the 9th section enacts that the magistrates, before whom the informations were taken, shall, upon receiving ten days' notice, return the recognizances or examinations to the next Commission of Oyer and Terminer for the adjoining county, and that after the delivery of these notices it shall not be lawful to prefer a bill at the Sessions of Oyer and Terminer for the county of the city; and the 13th section enacts that such persons as remove an indictment to an adjoining county shall enter into recognizances in the sum of 40*l.* to pay the extra costs attending the prosecution in such next adjoining county. It is asserted that, by the latter clause of the 9th section, no one shall prefer a bill in the city, or remove a bill under this act after one has been found in the county. The enactment is not in these terms or to this effect; the provision is, that after the delivery of any of the said notices, &c., it shall not be lawful for any person to prefer any indictment in the county of the city: here it is expressly stated on affidavit that no notices were served, therefore this case plainly does not come within this enactment; the enactment is that, after the delivery of the notices, the indictment shall not be removed back. It has been argued, on behalf of the prosecution, that this enactment has been made to assist the prosecutor, not to restrain him from preferring an indictment; the provision operates, not after preferring or finding a bill, but after the delivery of the notices, which not having been delivered here, it does not apply; and it is further argued, that the Queen is not bound or intended to be bound by such provision, the word used being "person." Before the passing of this statute, it was not illegal, as I before have shown, during the pendency of a former indictment, to prefer another; so it seems inconsistent that we should, where there is no express provision in the act to that effect, restrain the Attorney-General from preferring a second bill of indictment in the place where the

REG.  
v.  
DUFFY.

*Indictment—  
Jurisdiction—  
Practice.*

Judgment of  
Perrin, J.

REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

Judgment of  
Perrin, J.

offence was committed, where the officer of the crown thinks it more proper to proceed; no doubt he cannot proceed on both; no doubt the court will take care to prevent any abuse or vexatious use of such proceeding. There are several cases where a party has the option of preferring an indictment in one of several counties, as, if an offence is committed travelling on a coach, or on the border of a county, but no precedent, or case, or authority has been shown deciding that any of the several indictments, whether prior or subsequent to the other, is invalid. And it has been further argued, that though the Queen may have the advantage of the statute to remove the prisoner, yet that the crown is not bound by the prohibitory clauses of the 9th or of the 13th sections of the act, by which recognizances are directed to be given. And this is my opinion,—I am of opinion that there is nothing in the statute prohibiting the Attorney-General from sending up a fresh bill of indictment in the county of the city, though a bill has been found, and may be pending in the city; we cannot find any case to bind or restrain the crown by these general words. Suppose a private person prefers a bill and serves notice, and the Attorney-General was of opinion that another bill ought to be preferred in the county of the city, as in the case of *Swan and Jefferies*, is there anything in this statute to restrain or to take away the common law right of the crown? I do not think that there is: I think that we cannot imply any provision to that effect, the result of which would be to deprive the crown of the power of enforcing the due administration of justice, and preferring a fit and proper bill, if the advisers of the crown and the responsible officer were of opinion that it was a proper bill; neither do I think that in this case, where a bill in the county has been preferred by the Attorney-General, and where, on further consideration, whether, in consequence of the rule made by the Court of Queen's Bench in *Martin's case* (3 Cox C. C. 319), removing the objection to a trial in the city, or on the ground of the question of the statute, if he is of opinion that this bill is better adapted to the case, I do not think that there is anything calling on us to prevent him from prosecuting in such manner as he may think fitting for the ends of public justice. I do not think we ought, on this motion, to quash this bill, or that we ought to imply a prohibition restraining the crown though no such is expressed; we are to take care that the prisoner is not exposed to the inconvenience of two trials, or to any future serious inconvenience, if any such be alleged upon that point. On looking into the two indictments, which we thought it our duty to do, and which was the reason that we did not give our judgment on Saturday, we find that this indictment is much shorter than the former, one-third of the length; it contains twenty-three pages instead of sixty-seven, and contains six counts instead of thirteen. It varies in some particulars, omitting some things and containing some matters which the other did not. On looking at the subject-matter and the authorities, we do not find that there is anything in the act, directly or by necessary implica-

ion, abridging the power of the crown to send up another bill of indictment. It was argued that it might be arbitrary and an injustice to give the Attorney-General a power to select his venue, which would be the effect of the construction which we are inclined to give the statute. But we cannot, even if such argument be well founded, extend the act or import into it provisions which it does not contain, and though it has been said that this proceeding is harassing and oppressive, nothing substantial of that sort has been advanced either on affidavit or in the argument. It is said that the prisoner has made considerable preparations for his defence, but there is no allegation that these preparations have been thrown away; there is no allegation that he cannot have a fair and impartial trial. It has been said that this indictment having been preferred will deprive the prisoner of the benefit of the Habeas Corpus Act, but it will be my duty to take care that it shall not; how it could, we cannot see, but we shall take care that it shall not. The prosecutor is ready to go to trial, the only delay is by the prisoner himself declining to plead; there is no allegation that the prisoner is not ready for trial, that the defence which has been prepared is inadequate to meet this case; the only material alteration is one to which neither the prisoner nor the court have reason to object, that the present indictment is shorter than the former, that it has been reduced two-thirds, so as to be only one-third of the other in length. The only other objection is the pendency of the second indictment, that exists merely by the act of the prisoner's counsel, and his opposition to the motion of the Attorney-General to have it quashed; and that objection was ruled, in *Swan and Jefferies case*, even on plea, to be an insufficient objection. But we will take care that the second indictment shall not prejudice the prisoner, in whatever manner it is to be effected; we therefore think that we cannot comply with this application, which appears to me to be one of the first impression; it appears to be unsupported by any direct authority, and it also appears to me that the 9th section of the statute does not apply to this case, and, therefore, this motion must be refused.

RICHARDS, B.—I fully concur in the judgment that has been pronounced by the senior member of the court, and if it were not that this is a case of some novelty and one involving the construction of a somewhat recent act of Parliament, and upon which there have been very few decisions, I should content myself with merely expressing my assent to the judgment that has been delivered; but the case being circumstanced as I have mentioned, I consider it upon the whole more proper that I should briefly state what has been passing in my mind upon the several questions that have been discussed at the bar. The 1st section of this statute relates to indictments or informations in the superior courts, and empowers those courts, on application on behalf of Her Majesty, or of any prosecutor or defendant, to give orders for the striking of a special jury. In that section the crown is named expressly not-

REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

Judgment of  
Richards, B.

Rsg.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

Judgment of  
Richards, B.

withstanding that the general term "prosecutor" is always used in the section; and that certainly gives colour to the argument, that, where it was intended to include the crown the crown was expressly named, and that the general term "prosecutor" was not considered by the framers of the act as sufficient to include or comprise the crown. But on looking to the 2nd section, it would appear to me that the general term "prosecutor," as used in that section, very plainly includes the crown as well as all other prosecutors: that section empowers the superior courts to direct issues joined in all *actions* and prosecutions depending in such court, to be transferred for trial from the jurisdiction of a city or town to the next adjoining county, and amongst other proceedings enumerated and included in that section, I find every information filed by Her Majesty's Attorney or Solicitor-General. But how is the necessary order of the court to be obtained for such transfer of those issues? It is to be obtained at the prayer and instance of any prosecutor or plaintiff, or of any defendant, &c., not at the prayer and instance of the Attorney or Solicitor-General prosecuting on behalf of Her Majesty, and of any prosecutor, &c., but generally at the prayer and instance of "any prosecutor." (His lordship read the section.) If, therefore, the naming of the crown, in addition to the general term "prosecutor" as used in the 1st section, affords an argument one way, the including the crown in the general term "prosecutor," in the 2nd section, ought to bear a contrary inference. But this is an enabling statute intended for the benefit of all plaintiffs, prosecutors and defendants; and finding that it was in the two first sections manifestly intended to include the crown, and the term prosecutor in the 2nd section was used for that purpose, I confess I should feel very great difficulty in holding that the 3rd section should receive a construction limiting its operation to prosecutions carried on by private parties alone. No reason has been suggested why the Legislature should have intended to exclude the crown from the benefits conferred on prosecutors by the 3rd section. Prosecutions carried on by the crown are carried on *pro bono publico*, and were as much within the mischief which the section was intended to remedy as prosecutions by private persons. But all prosecutions are in the name of the crown. (His lordship read the 3rd section.) The 4th section relates to cases where indictments have been already found, or inquisitions already had before coroners, and in all such cases it empowers the courts of Oyer and Terminer, &c., to make orders for the transfer of all such indictments, inquisitions, &c. (and the like), to the proper officer of the next adjoining county. But how is that to be done? Just as was before directed by section 2, viz., at the prayer of any prosecutor or defendant. Now I think it could scarcely be argued that the word "prosecutor" in this section ought not to bear the same interpretation as the same word in the 2nd section, or that the right to have such a transfer made should be conferred on a private prosecutor, and also on a party prosecuted, but not on Her Majesty or on Her Majesty's Attorney-General prosecuting on Her Majesty's

behalf. I pass over for the present the other sections till I come to the 13th, the last section. By that section it is enacted that the "person" seeking to change the jurisdiction, shall, before doing so, enter into a recognizance for payment of any extra costs attending such change of jurisdiction. It has been suggested that this section may be resorted to for the purpose of interpreting and limiting the previous part of the act, and that where entering into such a recognizance has been required as a preliminary step to the changing of the jurisdiction, it should be held that it could not have been the intention of the Legislature to include the crown in the act, as it would be absurd to require any such security from the official functionary of the crown, and I agree that it would be absurd to require the Attorney-General to enter into such recognizance. But my answer is, that that section (the 13th) imposing this duty and obligation, does not extend to, or include, the crown; the word used in it is "person," dropping the general term "prosecutor," which was used in former sections. I think it plain that this section was intended to apply to private persons only, and the act may, in my opinion, be very well and without inconsistency so construed. (His lordship read 13th section.) It has, however, been argued, and I now come to the more important question raised for our decision, that where a prosecutor once avails himself of the act and takes any proceedings to transfer the jurisdiction, such party can never afterwards again resort to the limited jurisdiction; and the 9th section is relied on for that purpose. This argument, as I understand it, is rested entirely on the 9th section; indeed, independent of that section, there would be no ground for maintaining the proposition contended for as a fixed and settled principle of law. Judge Perrin has referred to authorities to show that one indictment cannot be relied on as an answer to another indictment for the same offence; and, in addition to the cases so referred to by him, I would, in support of the same proposition, refer to Hawkins P. C., vol. 2, p. 251, c. 32. Now I confess I am strongly disposed to be of opinion that the 9th section was consequential on the 3rd section. That section (the 3rd), I have already mentioned, was conversant with cases where the bill of indictment had been found within the limited jurisdiction, and where the venue had been transferred before the finding of any bill, and several other sections of the act rendered it obligatory on all prosecutors and witnesses, as well as parties charged, to attend at the court of Oyer and Terminer to be held for the next adjoining county to which the jurisdiction had been so transferred, on receiving certain notice for that purpose (see 7th and 8th sections); now the 9th section required the magistrate or other persons before whom such prosecutors or witnesses, or party charged, had entered into recognizances, to return them to the county, instead of to the city or town jurisdiction, on receiving ten days' notice for that purpose before the holding of the sessions in the county, and as consequential upon such change of jurisdiction and transfer of recognizances, &c., it was enacted that no person, after the delivery

REG.

v.

DUFFY.

Indictment—  
Jurisdiction—  
Practice.

Judgment of  
Richards, B.

REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.

Judgment of  
Richards, B.

of such notice, should prefer any bill of indictment, &c., to such limited jurisdiction. (His lordship read 9th section.) That interdiction was, in my opinion, intended to prevent confusion, and to prevent a defect of justice by the officer of the court or some other person indiscreetly or unadvisedly preferring a bill of indictment in a jurisdiction where neither prosecutor, witnesses, nor accused were then bound by recognizances to attend, and the circumstance of this interdiction not extending to cases where the jurisdiction had been transferred by order of the court under the 4th section, is strong to favour that construction. But, possibly, from the wording of the 9th section, it might be construed to preclude any party from ever again resorting to the original jurisdiction who had once made his election according to the provisions of the statute to resort to the county jurisdiction; I will not say how that may be, but be that as it may, I think it very plain that the section can only extend to cases where the notices prescribed by the section itself have been actually served. If no such notice as that contemplated by the act has been served, the case is not within the statute, nor to be governed by it. The defendant availed himself of an omission somewhat similar in principle at the last commission, the writ of *habeas corpus* for his removal from the city to the county jurisdiction not having issued ten days before the last commission, as provided for by the 6th section of the act; upon that ground he insisted, and successfully, that he could not be transferred to the county jurisdiction, or required to plead to the indictment found in the county. But here, no notice whatsoever was ever served under the 9th section, or under the other sections of the act, and the prisoner has never been transferred to the county jurisdiction nor pleaded to the indictment found in the county, nor has any judicial step been taken or act done on that indictment; under those circumstances I would be slow to hold that any prosecutor, whether a private person or the crown, would be precluded in point of law from abandoning his inchoate and incomplete attempt to change the jurisdiction, and prevented from preferring his fresh indictment in the county of the city; on the contrary, my opinion is that, inasmuch as the indictment in the county has not been acted upon by the arraignment of the prisoner, nor the prisoner transferred to that jurisdiction, nor any notice served, such as is required by the statute, especially by the 9th section, the prosecutor in this case (supposing the 9th section to bear the construction contended for on the part of the prisoner), ought not to be considered as having made his election under the statute to abandon the city prosecution, so as to preclude him for ever from resorting to that jurisdiction again. This being my opinion, it is unnecessary to consider the very important question whether the Attorney-General, acting for the crown and availing himself of the provisions of this act, ought not to be bound as any other prosecutor would be by the restrictive provision of the 9th section, and whether the court would not be authorized and required to apply the principle to be extracted from the 9th section to such a case.

Generally speaking, the words "person" or "persons," in an act of Parliament, will not bind the crown; but, if the defendant had pleaded to the county indictment, or if the notices contemplated by the 9th section had been served, I am not prepared to say what opinion I should, under such circumstances, have arrived at on this point; all I mean to convey at present is, that I would not wish to be understood as expressing an opinion one way or another on that subject. With respect to the general allegations of hardship and oppression suggested on the part of the prisoner, my brother Perrin has shown that no inconvenience to the prisoner can result from the course taken by the crown in this case. If we found that the proceedings were calculated unjustly to oppress the prisoner and to delay him from having his case disposed of, although the pendency of one indictment cannot be relied on as an answer to a second indictment for the same offence, I should nevertheless hope the court would possess sufficient power to prevent the abuse of sending up indictments, *toties quoties*, in different jurisdictions, for the purpose of embarrassing a prisoner in his defence, or delaying him from having himself delivered of the charge against him. But that is not the present case, and whatever the reasons of the Attorney-General may be for resorting now again to the city jurisdiction, no fact has been suggested from which it can be fairly inferred that any difficulty has been caused to the party charged by the course so adopted by the crown, and it shall be our duty to take care that the prisoner shall not be in a worse position in reference to the period of his trial by means of the present proceedings, than he would be if he were to be tried upon the indictment preferred in the county, and this we have full power within ourselves to accomplish, inasmuch as we are sitting under a commission for the county of the city of Dublin, as well as under a commission for the county of Dublin, and it is our present intention to dispose of every case in the several calendars laid before us before we rise.

REG.  
v.  
DUFFY.  
—  
Indictment—  
Jurisdiction—  
Practice.



## YORK WINTER ASSIZES.

December 19, 1849.

(Before Mr. Justice WILLIAMS.)

REG. v. HANSON. (a)

*Misdemeanor.*

*Administering cantharides to a woman, with intent to injure her health, is not a misdemeanor at common law, neither is it an assault, nor within the statute 7 Will. 4 & 1 Vict. c. 85, making it felony to deliver any dangerous or noxious thing with intent to do grievous bodily harm.*

Indictment.

THE prisoner was indicted for that he, at the parish of Almond-bury, in the county of York, unlawfully, wilfully, knowingly and maliciously, did administer to, and cause to be taken and swallowed by, one Mary Warburton, a large quantity, to wit, one drachm in weight, of a certain poisonous and destructive thing, to wit, cantharides, with intent then and there and thereby to injure the health of her, the said Mary Warburton; and the jurors aforesaid, upon their oath aforesaid, do further present that the said Mary Warburton, then and there, and thereby, became and was sick, sore, ill, distempered, disordered and diseased in her body, so that her life was despaired of, to the great damage of her, the said Mary Warburton, to the evil example of all others in like case offending, and against the peace of our Lady the Queen, her crown and dignity. There were other counts varying the description of the offence, but laying the intent to injure the health. There were also counts for a common assault.

*Blanshard* (for the prisoner) submitted that the offence charged in the indictment was neither a misdemeanor at common law nor an assault. It was nothing more than a private wrong, the remedy for which was by a civil action, and not by a criminal proceeding.

*Overend and Pearce* (for the prosecution) submitted that the corporal injury sustained by the woman, which was the effect of the poisonous and destructive thing administered by the prisoner (cantharides administered in rum) amounted to an assault, and though the woman had taken the cantharides voluntarily, not knowing that it was contained in the rum which was presented to her, yet that the fraud amounted to force (*Reg. v. Button*, 8 Car. & P. 660), and that it was a misdemeanor at common law to give any person injurious food: (4 Bla. Com. by Chitty 162; 2 East P. C. 822; 6 East; 3 M. & Selw. 10; 4 Camp. 10; 1 Russell 674, 752, n.; *Reg. v. Walkden and others* 1 Cox C. C. 282; *Reg. v. Dilworth* 2 M. & Rob. 531.)

(a) Reported by T. CAMPBELL FOSTER, Esq., Barrister-at-Law.

WILLIAMS, J. (after consultation with Creswell, J.), said that he was of opinion that the indictment could not be sustained, as the offence charged was not either an assault or a common law misdemeanor. His lordship added, that they were also of opinion that the case was not within 7 Will. 4 & 1 Vict. c. 85, which made it felony to deliver to any one any dangerous or noxious thing with intent to do grievous bodily harm.

REG.  
v.  
HANSON.  
—  
Misdemeanor.

*The prisoner was therefore acquitted.*

## YORK WINTER ASSIZES.

December 19, 1849.

(Before Mr. Justice CRESSWELL.)

REG. v. FENWICK. (a)

*Demurrer—Defects in indictment cured by pleading over.*

*A mistake in the year of the Queen's reign in which the offence is stated to have occurred, is cured by pleading over, and can only be taken advantage of on demurrer.*

THE prisoner was indicted for forgery at Kingston-upon-Hull, on the 2nd of May, in the *thirteenth* year of the reign of Her Majesty. The prisoner being undefended, the learned judge remarked that the date of the offence was wrongly laid, being the 2nd of *next* May.

*Archbold* (for the crown) submitted that the defect was cured by pleading over, it being one of the defects within the 21st section of 7 Geo. 4, c. 64. In the case of *Reg. v. Law* (2 Moo. & Rob. 197) it was decided that objections which are within that statute must be taken on demurrer. There it was objected that the indictment ought to have concluded *contra formam statutorum*; and Baron Alderson remarked, "the object of the Legislature, as it is stated in the preamble, was to discourage technical niceties which intercept the punishment of offenders." Here, indeed, this objection is taken before verdict, but it is too late, for it should have been taken by demurrer. In the case of *Reg. v. Odgers* (2 Moo. & Rob. 474), it was objected to the indictment that its commencement was bad, it being the jurors *of* our Lady the Queen instead of *for*; and Mr. Justice Cresswell decided that the objection could only be taken advantage of by demurrer. And in two other cases Baron Parke and Mr. Justice Patteson laid down the same rule.

CRESSWELL, J.—That is sufficient.

*The trial accordingly proceeded.*

(a) Reported by T. CAMPBELL FOSTER, Esq., Barrister-at-Law.

## OXFORD CIRCUIT.

## GLOUCESTER SPRING ASSIZES.

*April 4, 1849.*

(Before Mr. Baron PLATT.)

REG. v. HENRY HARRIS AND OTHERS.

*Bankruptcy—Evidence—London Gazette—Condition precedent.*

*Under the 5 & 6 Vict. c. 122, s. 24 (re-enacted by 12 & 13 Vict. c. 106, s. 233), which makes the advertisement in the London Gazette conclusive evidence of the bankruptcy and fiat, if the bankrupt shall not, within the periods therein mentioned after such advertisement, have commenced an action, suit, or other proceeding, to dispute or annul the fiat, &c.; it is necessary to prove, as a condition precedent to putting the Gazette in evidence, that the bankrupt has not taken the steps mentioned.*

*The question of the sufficiency of such preliminary evidence is one of law for the judge to decide.*

*The production, by the Registrar of the Court of Bankruptcy, of the books containing the entries and minutes of the proceedings relative to the bankruptcy and the absence therein of all reference to any such step being taken by the bankrupt, together with the evidence of the solicitor to the fiat that he had no knowledge of any action having been brought to dispute the fiat—held sufficient evidence to let in the Gazette.*

*On an indictment against a bankrupt and other persons for an offence under the bankrupt laws, the Gazette is evidence of the bankruptcy and fiat only as against the bankrupt himself, and not as against the persons indicted with him.*

THE first count of the indictment alleged that before the committing of the offences by Henry Harris as thereafter mentioned, to wit, on the 20th of October, 1843, the said Henry Harris was a trader within the meaning of the bankrupt laws, and being indebted as therein alleged, became and was a bankrupt. That a fiat was duly issued and directed to the District Court of Bankruptcy at Bristol, and that on the 14th of November the said Henry Harris was adjudged a bankrupt. That he surrendered himself to the said District Court, and was duly sworn and “duly submitted himself to be examined before the said court.” The indictment then averred that the said Henry Harris “at the time of his said examination,” to wit, was possessed of a certain real

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

estate described in the indictment—that the said Henry Harris “at the time of his said examination, and being so sworn as aforesaid, then and there, as last aforesaid, feloniously did not discover when he disposed of, assigned and transferred the said real estate of him the said Henry Harris, being such bankrupt as aforesaid, (a) the same not having been really and *bonâ fide* before then, and before the time last aforesaid, sold or disposed of in the way of the trade of the said Henry Harris, or laid out in the ordinary expenses of the family of the said Henry Harris, with intent then and there and thereby to defraud the creditors of the said Henry Harris being so bankrupt as aforesaid.” It was then averred that Henry Harris the younger, Elizabeth Harris, and Ann Harris, feloniously were present aiding, abetting and assisting the said Henry Harris the felony aforesaid to do and commit. There were five other counts in which the statement of the preliminary proceedings in bankruptcy, and the description of the bankrupt’s real estate, were varied, but the offence was described in the same terms as in the 1st count.

REG.  
v.  
HARRIS  
AND OTHERS.  
—  
Evidence—  
Bankruptcy.

On the part of the prosecution, a copy of the *London Gazette* of Tuesday, 21st November, 1843, containing the advertisement of Harris’s bankruptcy was tendered in evidence to prove that Henry Harris became a bankrupt before the date and suing forth of the fiat, and that the fiat was sued forth on the 11th of November, 1843, being the day on which it was stated in the *Gazette* to bear date.

*Huddleston* and *P. M. Mahon* (for the prisoners) objected to the admissibility of the *Gazette* in evidence. The *Gazette* was evidence only where the bankrupt had not disputed his bankruptcy. The 5 & 6 Vict. c. 122, s. 24, (b) enacted, “that if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication) within twenty-one days after the advertisement of the bankruptcy in the *London Gazette* or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit or other proceeding, to dispute or annul the fiat, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law, or suits in equity, brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, and that such fiat was sued forth on the day on which the same is stated in the *Gazette* to bear date,” &c. Before the *Gazette* could be made evidence of the above facts, the prosecution must prove that the bankruptcy was undisputed by the bankrupt. It was a condition precedent to the admissibility of the evidence.

*Huddleston*  
and *M. Mahon*  
for the  
prisoners.

(a) See note, *post*, p. 143.

(b) See now 12 & 13 Vict. c. 106, s. 233.

REG.  
v.  
HARRIS  
AND OTHERS.  
—  
Evidence—  
Bankruptcy.

*W. H. Cooke and Vaughan* for the prosecution, submitted that if such a construction of the section in question were permitted, the limitation would defeat the act of Parliament altogether. It would impose on the prosecution the burden of proving a negative, and it would be next to impossible to supply such evidence.

*Huddleston and M<sup>c</sup>Mahon* (in reply) answered that it was a great convenience to the prosecution to be relieved from the necessity of proving all the preliminaries that otherwise would be necessary, and it was far easier to prove that a fiat had not been disputed than to prove those preliminaries.

PLATT, B. (after some consideration) ruled that the proof that the fiat was not disputed was a condition precedent to the admissibility of the *Gazette* in evidence, adding, that he saw no difficulty in the prosecution proving that the fiat had not been disputed.

The registrar of the District Court of Bankruptcy at Bristol was thereupon examined. He produced the books containing the entries and minutes of the proceedings relative to the bankruptcy of Harris, and stated that there was no notice or mention of any step taken by the bankrupt to supersede or dispute the fiat.

The solicitor for the fiat was also called, and he stated that he never heard of any action having been brought to dispute the fiat.

PLATT, B., said the question of the sufficiency of this preliminary evidence was for him to decide, and he was satisfied that enough had been proved to let in the *Gazette* as evidence.

The *Gazette* was then put in, and the advertisement of Harris's bankruptcy read.

The counsel for the prisoners inquired if it was intended on the part of the prosecution to offer any further evidence of the trading, act of bankruptcy, and other preliminaries; and, being answered in the negative, it was objected, that although the production of the *Gazette* containing the advertisement of the bankruptcy was evidence of the bankruptcy and fiat as against Harris, the bankrupt himself, yet that it was no evidence against the accessaries, and that, as far as they were concerned, it was the duty of the prosecution to prove all the preliminaries of the trading, &c. The statute only made the *Gazette* evidence "in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt." It did not in terms extend to third parties, and the provision must be construed strictly.

*Cooke and Vaughan* for the prosecution, submitted that the statute clearly intended to dispense with the formal proofs in question, not only as against the bankrupt himself, but all those concerned in the commission of offences by him against the provisions of the bankrupt laws. It would be an anomaly if the act of Parliament made the *Gazette* evidence against persons dealing and making civil contracts with the bankrupt, and yet that it should

not be evidence against persons conspiring with him to commit a fraud in contravention of the statute itself.

PLATT, B. retired from the court to consult with Mr. Justice Coltman, sitting at Nisi Prius, and after an absence of a quarter of an hour returned, and said that from the commencement he had no doubt about the matter, but the counsel for the crown having pressed the point, he thought it his duty to consult his brother Coltman, who entirely concurred with him in thinking that the *Gazette* was evidence against the bankrupt alone, and not against the parties indicted with him.

Thereupon the other prisoners were acquitted. Harris, the bankrupt, was ultimately convicted.

REG.  
v.  
HARRIS  
AND OTHERS.  
—  
Evidence—  
*Bankruptcy.*

[After the bankrupt's conviction, his counsel moved in arrest of judgment, on the ground that the indictment did not sufficiently allege that the bankrupt had been *examined*, and also that there was no allegation that the bankrupt *had in fact* disposed of his real estate. Platt, B. refused to arrest the judgment, but reserved a case for the opinion of the judges upon the points, and in Michaelmas Term, 1849, the judgment was arrested on the last-mentioned ground. (See the case reported, *post.*)]

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## OXFORD CIRCUIT.

### STAFFORD SUMMER ASSIZES.

July 21, 1849.

(Before Mr. Justice ERLE.)

REG. v. ALDRIDGE. (a)

#### *Indictment—Description of property.*

*In an indictment for horse stealing, the animal, whether a horse, mare, gelding, colt or filly, may be described as a horse, although the statute 7 & 8 Geo. 4, c. 29, s. 25, mentions the particular species and gender.*

THE prisoner was indicted for stealing, on the 1st of June, 1849, at the parish of West Bromwich, a *horse*, the property of James Davis.

It appeared in evidence, that the horse was half cut, or, according to the provincial term, that it was a "ridgil."

It was thereupon objected, on the part of the prisoner, that the indictment improperly described the animal; that as the statute 7 & 8 Geo. 4, c. 29, s. 25, under which the prisoner was indicted,

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

REG.  
v.  
ALDRIDGE.  
—  
Indictment—  
Description of  
stolen property.

made use of the terms "horse, mare, gelding, colt, or filly," the indictment here should have described the animal as a "gelding."

ERLE, J.—The word "horse" is a generic term, and includes a gelding, and wherever there is a well known generic term or name for property, it may be described by that name in an indictment for stealing it. The same objection was made in a case where the indictment described the animal as a sheep, and the proof was the loss of a lamb. It was decided by all the judges, that the word "sheep" was a generic term, and included lambs: (*Reg. v. Spicer*, 1 Car. & Kir. 699.) I was a party to that decision, and I cannot distinguish the present case from that. I therefore think the indictment is correct, and that the objection cannot prevail.

The prisoner was convicted.

*Gordon*, for the prosecution.

*Rupert Kettle*, for the defence.

[This case settles the point, which, as Mr. Taylor observes (*Law of Evid.* vol. i. p. 188), was by no means clear, viz., whether a charge of stealing a horse is sustained by proof of stealing a gelding, a mare, a colt or a filly, although, as he observes, "if the principle be carried out to its legitimate extent, it would seem that no fatal variance would in such case arise." Under the repealed acts of 1 Edw. 6, c. 12, s. 10, and 2 & 3 Edw. 6, c. 33, which only mention "horses, geldings, and mares," it was held that proof of stealing a filly supported an indictment for stealing a mare: (*R. v. Welland*, R. & R. 494.)] [J. E. D.]

## OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES.

July 22, 1849.

(Before Mr. Justice ERLE.)

REG. v. ROBERTS, BLORE, ROBINSON, and SAVAGE. (a)

*Assault—Force of search-warrant, under 6 Geo. 4, c. 16, s. 29.*

*The 6 Geo. 4, c. 16, s. 29, (now repealed by the 12 & 13 Vict. c. 106), enacts that in all cases where it shall be made to appear to the satisfaction of any justice of the peace in England or Ireland, that there is reason to suspect and believe that the property of a bankrupt is concealed in any house, premises, or other place not belonging to such bankrupt, such justice of the peace is thereby directed and authorized to grant a search-warrant to the messenger under the fiat, and that it shall be lawful for such person to execute the same in like manner, and that such person shall be entitled to the same protection as is allowed by law in execution of a search-warrant for property reputed to be stolen or concealed. A search-warrant granted under the above section has the same force as an ordinary search-warrant delivered to a peace officer, and in justifying a seizure under it, it is not necessary to prove all the previous proceedings in the Court of Bankruptcy, or a right, in point of fact, to take the property sought for.*

THE defendants were indicted for a riot and assault. It appeared from the evidence, that Messrs. Jones and Oakes, who carried on business as ironmasters at Wolverhampton, became bankrupts, and Bodle, a messenger of the Birmingham District Court of Bankruptcy, was directed to take possession of the property of the bankrupts. In consequence of information he received that certain ironstone belonging to the bankrupts was lying in a boat on the canal, the messenger went before two neighbouring magistrates, and obtained a warrant under their hands, directed to himself and other officers, empowering them to search for the property of Messrs. Jones and Oakes. On the evening of the 14th of July, the messenger, accompanied by officers of the county police, went with this warrant to a part of the canal called "The Sixteen Locks," where several boats were lying in the basin, and boarded one called "The Elizabeth," which was laden with ironstone. The defendant Blore was in possession of the boat, and the other defendants were also there; a great number of persons, to the amount of between three and four hundred, were on the banks of the canal, and who, when the messenger of the Court of Bankruptcy boarded the boat, incited

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law



REG.  
v.  
ROBERTS  
AND OTHERS.

Search-  
warrant—  
Bankruptcy—  
Evidence.

those in possession to sink it. The messenger and other witnesses stated that Roberts and Savage made use of threats and attempted to sink the boat with the ironstone.

The search-warrant was proved, and the bill of lading of the ironstone was put in. It was to deliver ironstone from Lord Granville's mines to Messrs. Jones and Oakes.

For the defendants, it was elicited that the boat belonged to a person named Wassall, who let it out, with others, to Messrs. Jones and Oakes, the bankrupts. The bankrupts, according to the usual custom, employed a carrier on the canal to convey ironstone in their boats, and in others of his own from Lord Granville's mines to their works. The carrier was paid so much a ton, the amount of hire of Wassall's boats being deducted by the bankrupts from the tonnage paid to the carrier. The hire of the boats being in arrear to Wassall, he, according to the usage on such occasions, distrained the ironstone in "The Elizabeth," and possession of the boat was given up to Wassall, under this distress, on the 12th of July. It appeared that a notice of this distress was nailed on the outside of the boat at the time it was boarded by the messenger, and he tore it down. The defendant Blore claimed possession of the boat for Wassall, and the ironstone was ultimately sold under the distress.

*Skinner and Huddleston*, for the defendants, submitted that the authority of the messenger to enter and search must be shown, and for this purpose the bankruptcy, and the proceedings in the Bankruptcy Court, must be proved.

ERLE, J.—Although I am unwilling to throw any doubt on an ordinary magistrate's warrant, at present I am of opinion that proof must be given of the prior proceedings. Wassall, the owner of the boat, says the hirer owes him money for hire, and acts upon that. This is a substantial and not a fictitious claim, and supposing Wassall to have this right of distress, has anything more been done by the defendants than they were justified in doing? This case is much fitter to be tried by a jury in an action between the parties than by a criminal proceeding.

*Scotland*, for the prosecution, admitted that in consequence of the proceedings in the Birmingham Bankruptcy Court in this case, not having been enrolled, he was not in a condition to prove them, but submitted that the warrant itself was sufficient authority to the messenger to act as he had done. The 6 Geo. 4, c. 16, s. 29, enacted that "in all cases where it shall be made to appear to the satisfaction of any justice of the peace in England or Ireland, that there is reason to suspect and believe that property of the bankrupt is concealed in any house, premises or other place not belonging to such bankrupt, such justice of the peace is hereby directed and authorized to grant a search-warrant to the person so disputed by the commissioners as aforesaid, and it shall be lawful for such person to execute the same in like manner, and such person shall be entitled to the same protection as is allowed by law in execution of a search-warrant for property reputed to be

stolen or concealed." (a) The messenger, armed with a warrant under this section, had a clear right to enter and search, independent of any claim to the property, however *bonâ fide*, by other parties.

ERLE, J.—The words of the statute certainly seem to put Mr. Bodle in the same position as a peace officer. The defendants therefore were not justified in resisting the search, but under all the circumstances of the case, and with the clear fact that they acted under a *bonâ fide* belief in their right to resist, I think the ends of justice would be satisfied by the acquittal of Robinson, against whom the evidence is slight, and the other parties pleading guilty, and being discharged on their recognizances to appear when called on.

The counsel on both sides having assented to this course, ERLE, J. addressed the jury to that effect, saying, "The learned counsel for the prosecution has satisfied me that it is not necessary to show the validity of the proceedings prior to obtaining the magistrate's warrant. Under this warrant Mr. Bodle, the messenger of the Court of Bankruptcy, had just the same authority as an ordinary peace officer, entrusted with a search-warrant."

A verdict was then taken in accordance with the above arrangement, Robinson being acquitted, and the other defendants being discharged on entering into their own recognizances to keep the peace.

REG.  
v.  
ALDRIDGE.  
—  
Search-  
warrant—  
Bankruptcy—  
Evidence.

## OXFORD CIRCUIT.

### HEREFORD SUMMER ASSIZES.

August 1, 1849.

(Before Mr. Justice ERLE.)

REG. v. HARRIS AND ANOTHER. (b)

*Practice—Evidence of prisoner's statement.*

*Where a statement made by a prisoner before the committing magistrates appears on the face of it to have been duly taken under the statute 11 & 12 Vict. c. 42, s. 26, and is at the trial produced from the depositions of the witnesses taken at the same time, and appears to have been transmitted with them; it is receivable in evidence without further proof.*

THE prisoners were indicted for larceny of 40lbs. weight of copper.

Skinner, on the part of the prosecution, proposed to put in evidence a statement made by one of the prisoners before the

(a) The warrant from the justices appears to have been unnecessary, as the statute 5 & 6 Vict. c. 122, was in operation at the time, and by sect. 30 of that act, power is given to the Court of Bankruptcy to grant a search-warrant, which entitled the person to whom it was granted to the same protection as in the execution of a search-warrant for stolen or concealed property. The 6 Geo. 4, c. 16, and the 5 & 6 Vict. c. 122, are now repealed by the 12 & 13 Vict. c. 106, which, however (by sect. 106), re-enacts, in substance, sect. 30 of the 5 & 6 Vict. c. 122. [J. E. D.]

(b) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

REG.  
v.  
HARRIS  
AND  
ANOTHER.

Practice—  
Prisoner's  
statement.

committing magistrates. The requirements of the statute 11 & 12 Vict. c. 42, s. 26, (a) appeared on the face of the statement (which was in the form given in the schedule to the above act) to have been complied with, viz., the question put to the prisoner in the form directed by the statute, and it purported to be signed by the justices before whom it was taken. The statement was returned to the court with the depositions of the witnesses taken at the same time.

It was submitted that no evidence was necessary to prove that the statement was duly taken, the words of the statute being that such statement, if taken as directed, "may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices, purporting to sign the same, did not, in fact, sign the same," but,

ERLE, J.—"Without deciding whether any further evidence is necessary, I think if the prisoner's statement can be proved in the old way, it will be advisable to adopt that course."

*Skinner* said he was in a position to do so, but as the practice of the sessions had been to receive the depositions without further evidence, it was very important to have the point settled one way or the other.

ERLE, J. intimated that he would consider the point, and give his opinion before the termination of the assizes.

The prisoner's statement was then proved by a police-officer, who was present when it was taken and saw it duly signed.

On the following day (2nd August), ERLE, J. said,

I have consulted with my learned brother, Mr. Baron ROLFE, as to the proof of statements made by prisoners under the recent act of Parliament, and I find that he admits them without any evidence, considering them as having been duly transmitted with the examinations of the witnesses, unless anything appears to the contrary. This is also, I understand, the practice at Quarter

(a) "And be it enacted, that after the examinations of all the witnesses on the part of the prosecution, as aforesaid, shall have been completed, the justice of the peace or one of the justices by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect:—'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial.' And whatever the prisoner shall then say in answer thereto, shall be taken down in writing and read over to him, and shall be signed by the said justice or justices and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person, the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not, in fact, sign the same: provided always, that the said justice or justices, before such accused person shall make any statement, shall state to him, and give him clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor, in any case, from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person."

Sessions, and as it would be inconvenient to establish a different course, I shall, in future, adopt the same rule.

In a subsequent case at the Monmouthshire assizes (*Reg. v. Hunt*), ERLE, J., upon the counsel for the prosecution applying to have the prisoner's statement read as evidence, said,—“ You ask me for the statement. I hand it down, taking notice that it is in the proper form, and that it has been duly transmitted by the justices to the proper officer of the court; for if it appears to have been so transmitted, and there is nothing shown to the contrary, then it is to be assumed to have been duly taken according to, and within the meaning of the recent statute, and therefore no further evidence is necessary.”

REG.  
v.  
HARRIS  
AND  
ANOTHER.  
—  
Practice—  
Prisoner's  
statement.

## OXFORD CIRCUIT.

### OXFORDSHIRE SUMMER ASSIZES.

July 13, 1849.

(Before Mr. Baron ROLFE.) (a)

REG. v. LAYTON.

*Insanity, evidence of—Mode of putting the question to the jury.*

*Where a prisoner sets up insanity as a ground of defence, one cardinal rule is, that the burden of proving his innocence on that ground rests on the party accused. The question in such a case for the jury, is not whether the prisoner was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind.*

*The jury may come to a conclusion on this point from the conduct and acts of the accused shortly before and down to the commission of the alleged crime. Although insanity on one point, for instance, a delusion as to property, will not exempt a party from responsibility, the fact is not immaterial in considering his responsibility at another time and on another subject. The want of motive for the commission of the crime, and its being committed under circumstances which renders detection inevitable, are important points for the consideration of the jury, when coupled with evidence of insanity on any other particular point.*

*To ask a witness whether, in his opinion, the prisoner is capable of judging between right and wrong, is an improper question, for that is what no witness thought of, or is prepared to answer.*

THE prisoner, James Layton, was indicted for the murder of his wife, Martha Layton, by shooting her at the parish of Crossready on the 29th of May last.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

REG.  
v.  
LAYTON.  
—  
Evidence—  
Insanity.

*W. H. Cooke and Cripps*, for the prosecution.  
*Pigott*, for the prisoner.

It appeared from the evidence on the part of the prosecution, that, on the 7th of May, the prisoner and his wife were walking along the road between Leamington and Banbury, and according to the dying declaration of the deceased confirmed by other evidence, the prisoner who had been for some time chiding his wife, fired a pistol at her—she fell—the prisoner pulled her up and they proceeded a few yards, when he pushed her down and inflicted a wound on her throat with a knife. He then got over the hedge into a field, and ran some distance until he was overtaken by a person who had seen the woman fall. The prisoner wiped the blood off his hands, saying he had met with a misfortune and cut his finger. He would not tell what he had done with the pistol and knife, but said, "I did it, I intended to do it, and that will put an end to it. I have been unhappy since Christmas." He afterwards began to talk about his family affairs. To another witness who came up soon after, and who called the prisoner's attention to the blood on his hands, saying, "There is your wife's blood, are you not ashamed of yourself?" the prisoner replied, "If you knew all the circumstances, you would not blame me so much." At the time the prisoner shot and cut his wife, he must have known that persons were within a short distance, having just before met them in the wood. The woman lived until the 29th of May. On the 8th the prisoner had an interview with his wife, who said to him, "I forgive you all you have done, but I shall never see you any more." The prisoner afterwards observed to the constable, "I wonder what my wife meant when she said she should never see me any more. Do you suppose she means if she were to die I should be hanged, or if she gets well I shall be transported for life?" He repeated this on the following morning, and also said he hoped she would get well again for the sake of her family. The prisoner had threatened to murder his wife before the 7th of May; on the day before, he was heard sharpening a knife, and the deceased was afterwards seen running out of the house followed by the prisoner with a knife resembling one found the following day near the spot where the murder was committed. The prisoner at the time of the murder was, it appeared, going to Banbury to get work. The deceased's object in going there was to consult her friends as to a separation between herself and her husband in consequence of his threats of violence, but the object of her journey was concealed from her husband. The prisoner had been confined for two months in Warwick Gaol in the early part of the year for debt, having previously kept in the house for years to avoid his creditors: he had been unfortunate in building speculations. These were the material facts of the case proved on the part of the prosecution, tending to throw any light on the state of the prisoner's mind.

Case.

For the prisoner the following witnesses were called:—  
William Shirley Robey, superintendent of police at Leamington,

had known the prisoner for several years. Had had him in custody for some time: he was charged with stealing a deed from an attorney's office at Leamington. There was something strange in his appearance—when in the prison day-room he wanted to know the authority on which I detained him. I told him. I went that day to the Warwick Assizes and came back in the evening, and told him I had a document for him to sign if he thought proper. He — me and all the lawyers, and said he had signed documents enough and would sign no more. I told him if he did not sign it he would be charged with stealing the deed. He said he had not stolen it, and walked about the room in a state of excitement, and said I was in the conspiracy against him, and had robbed him of 300*l.* of which I had my share. He finally signed the document. I never had any money transactions with him, and there was no foundation whatever for the charge. I never had a quarrel with him. As I was taking him in a fly from Leamington to Warwick, he asked me how I should like to be shot. I said not at all, and asked him what made him think of that, and he replied that I was a — rogue, and it was time that I was shot, and a few more like me. I said, "You had better not try that here." He said, "They hang in this country don't they?" and I added, "and in all other countries." He said he had picked out a few more to shoot, and among them a lawyer or two. My opinion was that he was not in his right mind, and I stated so to the magistrate and the magistrate's clerk.

REG.  
v.  
LAYTON.  
—  
Evidence—  
Insanity.

Case.

Cross-examined.—Thought him insane when he signed the document. The deed was a deed of release respecting his own property, and the document was to promise to give it back. Thought him mad when I let him go from the magistrates. I gave instructions to his friends about him, Mr. Payne, a solicitor at Banbury. The prisoner came to me on the 27th of April last and said he wished to consult me on his affairs, and produced a bill of costs from a Mr. Overall, of Leamington, on which a balance of 16*l.* was due. He asked if I would go to Leamington to pay it. I suggested that he should employ some one on the spot. He said, No, there was no one he could trust, for his wife, and Caleb, her son, were trying to deprive him of his property, and then do for him, and the lawyers were in league with them. I inquired what property he had, and he said he had some houses, the surplus rents of which, after paying interest on mortgages, brought him 90*l.* a-year. He appeared excited and restless, and I thought from what I saw and heard, that his mind was affected. I proposed to meet, and did meet, him the following day at Mr. Pearson's. He then produced the bill of Mr. Overall, in which there was a charge for attending in Warwick Gaol to sign documents. He said, those documents were signed for the purpose of depriving him of his property and indicting him for perjury. He said they meant to indict him at the next assizes. I asked him why he thought so? He said, "I do not know why, but I know it is so." He then produced an agreement which he said he wanted Mr. Hobley, his

REG.  
v.  
LAYTON.  
—  
*Evidence—  
Insanity.*

brother-in-law, to sign. I told him it referred to nothing, and appeared to be unnecessary. He then wanted me to see Mr. Hobley, but he came that afternoon or the next morning, to say he would not trouble me. He appeared to be in great dread of a prosecution, of which nothing I could say would relieve him. I thought his mind affected. Saw from the bill of costs that he had been in Warwick Gaol. He was a stranger to me, and I knew nothing of his dealings at Leamington. I believed him insane, because he was in dread of an indictment for perjury. He could give no reason for this dread except the documents he had signed in gaol. I considered his mind disordered, but I would not go so far as to say that I thought him incapable of judging between right and wrong.

John Kelley, clerk to Mr. Apley, of Banbury, proved that the prisoner came to him about a fortnight before the 7th of May, and asked whether he or Mr. Apley were employed by Mr. Hobley. He then stated that his wife and her son Caleb, and her brother, Samuel Hobley, had a scheme for robbing him of his property. He came several times that day; he said he had some houses in Rosefield-terrace and Satchfield-street, and would pay Mr. Apley for his trouble by making over the houses in Rosefield-terrace, which, he said, produced a net income of 60*l.* a-year. He was very much excited; thought he was labouring under a delusion with respect to the property and the persons he mentioned; told his fellow clerk that I thought he was out of his mind.

Case.

Cross-examined.—Prisoner told me there had been an agreement to sell the equity of redemption in his property some years ago to Daniel Hobley, and that it was afterwards cancelled, but Hobley now wanted to keep to it. He seemed calm on the first day, and I did not think him then insane. I considered the prisoner labouring under a delusion, but formed no opinion as to whether he was incapable of judging between right and wrong.

George Pearson, hair-dresser at Banbury.—The prisoner's sister has kept my house for ten years. He came to my house on the 14th of April, and remained there till the 16th, when his wife came. She felt faint, and he brought a smelling bottle and applied it to her nose and dabbed her with water. He spoke, before he left, in such a manner of his property, and was so restless at night, that I thought him not in his right mind. He walked about a great deal at night. He went away. He went away on the 20th and returned on the 25th without his wife. He then said the Hobleys had got all his property by fraud. He said the papers which he had signed while in prison had placed him in such a situation that he could not avoid one of two evils—either to allow the Hobleys to take his property or, if he kept it, to expose himself to a charge of perjury. He remained till the 1st of May, when he went home. From his conversation and manner I thought he was not sane. I received a letter from him on the 3rd of May. He came at ten o'clock in the evening, and was greatly excited. He handed his sister a letter from his wife. He first said he could

not stay in my house, as they had got a prosecution against him for perjury; he stopped that night. He seemed to be walking about the room all night. In the morning he said he had been robbed of all his property and he should get out of the country as soon as possible or he should be transported.

REG.  
v.  
LAYTON.  
—  
Evidence—  
Insanity.

Anne Layton, a sister of the prisoner and housekeeper to the last witness, said that from what she saw of him at Banbury, in May, she thought he was not in his right mind.

Peter Layton, a brother of the prisoner. I saw him last summer at Mr. Pearson's. I reside in Banbury. Prisoner came to me in May and said he was completely robbed of his property, and they intended to transport him for perjury. He was much changed in his state of mind. In my opinion he was then insane.

Cross-examined.—Believed him to be insane on that one point respecting the intention of the Hobleys to rob him of the property.

William Williams, nephew to the prisoner.—I live with my mother in Woburn-court, Holborn, London. Prisoner came in the evening of the 4th of May to my mother's house. He said he had no home; he had been robbed of his property by all of us, and he must go to France to provide another home. He asked me to go to France with him. That was all his talk. I endeavoured to convince him, but made no impression. He was put to sleep in the same room with me. As soon as the light was out, he got out of bed, and pulled up the blinds and paced the room for twenty minutes. I endeavoured to induce him to return to bed. He said he had no business to sleep, and if he went to bed they would smother him. He went to bed soon, but soon got out again, and he was walking about all night. I got up at six. He was then at the window. I went to my work, and saw him no more. From what I saw of him, I believe him to be insane, and I wrote accordingly to my aunt, Anne Layton. Case.

Cross-examined.—He wanted me to go to Boulogne. He wished to learn the French language, and proposed to take ground at Boulogne and build houses there.

Alfred A. Walton.—I lodge with the mother of the last witness, in Holborn. I went into the room where the prisoner was, about six o'clock in the evening, and twice bid him the compliments of the evening, and he did not notice me. I then sat down, when suddenly, as if awaking from a dream, he got up and came across the room, and offered to shake hands with me, which of course I did. He talked about going to France, and building there. I reasoned against such a step; he said he had been robbed of all his savings, and would be robbed again if he remained here. In the course of the evening he took me for a superintendent of police, and asked how long I had held the situation. What convinced me most of his insanity was, that he said he had come to London in the same carriage with the Queen and two of the Princesses, and one of them resembled his daughter. He frequently seemed to forget who I was. When I left the room his sister came out after me, and asked me my opinion of him, and I told her. My judg-



REG.  
v.  
LAYTON.  
—  
Evidence—  
Insanity.

ment from what I saw was, that I thought him not capable of discriminating between right and wrong, since he was occasionally not conscious of the person to whom he was speaking. In answer to a suggestion of mine, in the morning after breakfast, as he was looking so ill, that he ought to go to the sea-side, he said, "I suppose you want to get me out of the country, and then to sell my property, and rob my children." He afterwards came to me, pulled out his purse, and wanted to pay me for measuring ground for him to build on. As I had not measured any, I said he had better let that stand over. He wanted me to go to France with him, in order to assist in building. I am a builder and surveyor.

Cross-examined.—The time I saw him last was about seven or eight o'clock in the morning of the 5th of May. I considered him then capable of committing a great crime without being conscious that it was a crime.

Some incoherent letters of the prisoner were then read, referring to the supposed charge of perjury against him.

The following witnesses were then called for the prosecution, to rebut the defence:—

Dr. Robert Jackson.—I am a physician in practice in this city. Have seen the prisoner on three occasions since he has been in prison, with a view to satisfy myself as to his state of mind. I saw him for nearly half an hour on each occasion, and conversed with him. The result is, that I saw no reason to induce me to believe he was insane. That was my impression at each interview. I thought him capable of distinguishing between right and wrong.

Cross-examined.—I asked him questions. The only question he asked me was, whether I had heard the result of the inquest. The interviews were on the 6th and 29th of June, and 6th of July. Heard the evidence of Mr. Walton. Thought it possible that the prisoner might not have been feigning while acting as Mr. Walton stated, and yet not have been insane. Such conversation would render it probable that he was not sane; but he might be sane, though labouring under a delusion.

Mr. John Freeman Wood, surgeon at Oxford, and to the gaol, attended the prisoner generally at the gaol, but visited him yesterday, for the first time, with a view to ascertain whether he was sane. When he first came to the gaol he was restless and sleepless. I gave him the ordinary remedies, which were successful, and I have heard no complaint since. From what I have observed, I think him capable of distinguishing between right and wrong. I cannot say that he is not under a delusion as to his property. A person who labours under a delusion as to his property is not necessarily insane.

Cross-examined.—I was not aware till yesterday that this plea would be set up, and therefore did not take any particular notice of him.

William Hobley, brother-in-law of the prisoner.—I live at Nathrop, near Banbury. Saw him a fortnight before my sister's death. He came to my house; she was with him. He asked me

Case.

to lend him 30*l*. I said I had not the money in the house to lend. His wife came and pressed me to lend it. Not much passed that evening. He came to my house next day as we were going to dinner. He and she had dinner with us. We had a good deal of conversation in the house on business, and his wife pressed the case to have a bill backed. I said, "If I had the money I would lend it, as I have no doubt you mean honestly." He was then as rational as ever I saw him.

Cross-examined. — There was no pretence for his saying I wanted to rob him. His property at Leamington has been sold since this occurrence by auction, to me, by the mortgagee. My brother Samuel has been ill for years.

John Enoch, painter and plasterer at Banbury, was formerly an apprentice of the prisoner. Saw him at Banbury, about ten days before this occurrence. He inquired about trade and prices, and proposed a partnership with me; he to carry on business as a broker as well, and said his property was about 90*l*. a year. I told him I had capital of my own, and declined the offer. He appeared to me quite rational.

ROLFE, B., in summing up the case, said, as there was no doubt that the prisoner had killed his wife, and the only question was whether, when doing so, he was a responsible agent, he should confine his observations to this question. The duty which now was incumbent upon the jury was the most difficult that could devolve on a jury or judge. Insanity was the most difficult question which could engage the attention of any tribunal. It was difficult to define it in words, or even in idea. The opinion of the judges was taken by the House of Lords a few years back, as to what was to constitute a definition of insanity, and it created very great difficulty, but after great and anxious deliberation, they came to the conclusion that the old description was the best, viz., that insanity should constitute a defence only when a party was in such a state of mind arising from disease as to be incapable of deciding between right and wrong, but that this definition was imperfect, as all definitions must be, and would require to be modified with reference to each particular case. Applying that law to the present case, he thought what the jury had to consider was, whether the evidence was such as to satisfy them that at the time the act was committed by the prisoner he was incapable of understanding right from wrong, as that he could not appreciate the nature of the act he was committing. Perhaps it would be going too far to say that a party was responsible in every case where he had a glimmering knowledge of what was right and wrong.

In cases of this description, there was one cardinal rule which should never be departed from, viz.,—that the burden of proving innocence rested on the party accused. Every man committing an outrage on the person or property of another must be, in the first instance, taken to be a responsible being. Such a presumption was necessary for the security of mankind. A man going about the world marrying, dealing and acting as if he were sane,

REG.  
v.  
LAYTON.  
—  
Evidence—  
Insanity.

Remarks of  
Rolfe, B.

REG.  
v.  
LAYTON.  
—  
Evidence—  
Insanity.

must be presumed to be sane till he proves the contrary. The question, therefore, for the jury would be, not whether the prisoner was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind. (a) On the other hand, however, they might arrive at the conclusion, from the nature of his conduct and acts up to the time of the act in question or shortly preceding it, that he was insane, though he was not capable of proving it by positive testimony, as such was the nature of the mind, that it might be one minute sane and the next insane, and, therefore, it might be impossible for a party to give positive evidence of its condition at the particular moment in question.

He would now, with a view to enable them to form an opinion on this subject, direct their attention to the evidence as to the state of the prisoner's mind.

After going through the evidence, his lordship said, he confessed that to his mind the evidence carried a conviction almost irresistible, that the man was labouring under some mental delusions. So many people could not be all so deceived as to arrive at that conclusion without some good grounds for it. There were two attorneys at Banbury, the superintendent of the Leamington police, Pearson the hair-dresser, the prisoner's brother and sister and nephew, and a comparative stranger from London, all agreeing that his manner and conduct left an impression that he was not right in his mind. A question asked by the counsel for the prosecution of the witnesses for the prisoner, namely, whether they thought him capable of judging between right and

Remarks of  
Rolfe, B.

(a) In the case of *Reg. v. M'Naughtan* (10 Cl. & Fin. 200; 1 C. & K. 130), referred to by Mr. Baron Rolfe, the following questions among others were propounded to the judges:—

"What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder for example), and insanity is set up as a defence?"

"In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?"

To these two questions the judges returned the following answer:—"That the jury ought to be told in all cases, that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of this question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put to the party's knowledge of right and wrong in respect to the very act he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course, we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require." [J. E. D.]

wrong, seemed to him to be very irrelevant, for that was what no witness thought of or was prepared to answer; all that witnesses thought of was, whether or not a person was in his senses, and the other was a mere technical mode of expression adopted by the judges. It was possible that the prisoner was feigning madness, but all the circumstances showed that was very improbable. The conclusion then seemed irresistible that he was to some extent labouring under a delusion, but he quite concurred with the counsel for the prosecution that he was not exempt from responsibility, because he was labouring under a delusion as to his property, unless that had the effect of making him incapable of understanding the wickedness of murdering his wife. But when that was the question they had to consider he could not say that it was altogether immaterial that he was insane on one point only. Indeed, his insanity on that point might guide them to a conclusion as to his sanity on the point involved in this case, and, in this view of the matter, there were two circumstances detailed in the evidence of great importance: these were, the want of motive for the commission of the crime, and its being committed under circumstances which rendered detection almost inevitable. His Lordship, after going through the parts of the evidence which supported these positions, concluded by telling the jury that they could come to no other conclusion than that the prisoner had taken away the life of his wife, and that this was murder, unless he satisfied them that he was not capable at the time of appreciating his acts.

REG.  
v.  
LAYTON.  
—  
*Evidence—  
Insanity.*

*Verdict, Not guilty, on the ground of insanity.*

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QUEEN'S BENCH CHAMBER, DUBLIN.

*December 16, 1849.*

(Before Mr. Justice MOORE.)

REG. v. LANGLEY. (a)

*Prisoner's bail.*

*A prisoner against whom a bill has been found for murder, and who has applied for, and obtained, a postponement of his trial, will not be admitted to bail.*

**M**'CARTHY, Q. C., applied to have the traverser admitted to bail. It appeared that the wife of the traverser had died sud-

(a) Reported by J. O'FLANAGHAN, Esq., Barrister-at-Law.

REG.  
v.  
LANGLEY.  
—  
*Practice—  
Bail.*

denly of cholera; but, unfortunately, a disagreement had arisen between her and her husband a few days prior to her death, and the traverser in a passion had forced her to leave his house. An inquest being held on the body, the jury returned a verdict of manslaughter; but he submitted the depositions as taken by the crown did not sustain this finding. Poison was said to have been administered, and had been the cause of her death; the stomach was analyzed, and a number of doctors agreed in stating no trace whatever of poison appeared. Under these circumstances, the traverser surrendered to take his trial in May last, but the grand jury found a bill against him charging him with murder. We do not know on what evidence this bill was found. If nothing more than is disclosed in the face of the depositions before the crown, it is wholly unsupported. In consequence of the excitement prevalent in the country, the traverser's counsel advised him to apply for a postponement of his trial, and the crown not opposing the application, the postponement was granted. He now sought to be admitted to bail.

*Baldwin, Q. C.* (for the crown), opposed the application.—The trial was postponed at the request of the traverser. The crown was ready to proceed with the prosecution. The grand jury had found an indictment for the capital felony although the coroner's jury had only found one for manslaughter. He admitted that if this finding rested alone on the depositions, it would not be satisfactory, but it did not: other witnesses had been examined before the grand jury.

*MOORE, J.*—My difficulty is that the grand jury have found bills for murder, and the trial was postponed at the instance of the prisoner. It is at his own instigation he remains in custody and ought not to complain of it. I will consider what can be done.

*McCarthy, Q. C.*—There are affidavits that the prisoner's health is very bad, and much prejudiced by the confinement: (*Gray's case.*)

At a subsequent day Moore, J., refused the application.

## COURT OF QUEEN'S BENCH.

(Before the FULL COURT.)

*Easter Term, 1848.**April 20 and 27.*

GRACE v. THE LORD BISHOP OF OSSORY. (a)

*Practice—Convicted felon—Disability of—Registrar of diocese—Removal of—Prohibition—Ecclesiastical Courts.**The Bishop of Ossory having instituted proceedings in the Ecclesiastical Court to remove the registrar of the diocese from his office in consequence of his having been convicted of forgery, and sentenced to transportation, the registrar moved for a prohibition to restrain the bishop from proceeding against him in the Ecclesiastical Court.**The court refused to grant the writ, holding, first, that the registrar being a convicted felon, was therefore disqualified from making the application; and secondly, that even if it were not so, the bishop was justified in proceeding by suit in the Ecclesiastical Court to deprive him of his office.*

ON the 26th of January a conditional order had been obtained on the part of William Grace, registrar of the diocese of Ossory, for a prohibition to restrain the lord bishop of the diocese from proceeding in a suit in the Ecclesiastical Court to remove Grace from his office. Grace had appointed a deputy in October, 1846, and in the November following proceedings were taken to remove him from the office. The affidavit of the bishop stated that the applicant had been convicted of several acts of forgery, and had been sentenced to seven years' transportation, and that inasmuch as the office of registrar of a diocese was one of great trust and confidence, the person holding it being entrusted with the care of all the public records of the diocese, the applicant could not properly be continued in the office.

*Gayer, Q. C.* (with whom were *F. A. Fitzgerald* and *E. Pennefather*), now showed cause against the conditional order.—I fully admit that the applicant is not removable from his office at the mere will and pleasure of the bishop or any other person, unless clear cause exists for his removal, but I contend that he is removable in any case where the ecclesiastical judge, whose officer he is, considers that there is sufficient cause,—subject, of course, to appeal to the Metropolitan Court, and ultimately to the Court of Delegates. It

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

GRACE  
F.  
LORD BISHOP  
OF OSSORY.

Practice—  
Convicted  
felon.

has been decided, upon the highest authority, that the office of registrar of a diocese, though in some respects connected with the bishop in his personal capacity, is considered as an office connected with the administration of justice in the Ecclesiastical Courts, and that brings the case within the general principle that every court has a discretionary power over its own officers, to prevent injury to the public and disgrace to the court itself, by reason of any misconduct on the part of its officers. This has been established as early as *Dr. Trevor's case* (Cro. Jac. 269); *Lake v. Pigeon* (Nels. Rep. 27.) In the recent case of *Master Lynck's Clerk* (1 Phillips, 661), the Master of the Rolls in England observes, that each court of justice had a general power over its own officers to remove them where guilty of misconduct. So also, in *Kennedy's case* (7 Ir. Law R. 225), in which the question was as to the right of the chief justice of the Common Pleas to remove the clerk of the court.

*Jackson, J.* said, that there was no doubt that the court had the power to inquire into the conduct of its officers, and punish them if necessary, and that such a jurisdiction was inherent in every court: (Bac. Abr. 211, "Office," M.) No doubt the office held by Grace is an office for life, and also of a temporal character, but it would be monstrous to hold that, having been transported as a felon, he could still hold the office. If the crime of which he had been convicted had been committed in his office as registrar, there could be no question that the bishop might remove him at once, he would have forfeited it *ipso facto*, and the proper course would have been for the bishop to appoint another: (*The Earl of Shrewsbury's case*, 9 Coke, 50; *Vaux v. Jefferin*, 2 Dyer, 114, b.) But it is in consequence of its having been committed in a different capacity that it became necessary to institute proceedings, in order that the party might have an opportunity of explaining his conduct, and setting up a defence, if possible: (*Reg. v. Smith*, 5 Q. B. 621; *Sutton's case*, Cro. Car. 65, and Godb. 390.) The only case going to shake the authority of *Sutton's case*, is *Jones v. The Bishop of Llandaff* (4 Mod. 27), but the court will find, from the observation of Eyre, J., that the argument is based on the supposition that *Sutton's case* was not decided by a proper court, but by the Star Chamber, which mistake, perhaps, arose from its being reported in Cro. Car., next to a report of a case in the Star Chamber, and so far from overruling *Sutton's case*, no decision was given in *The Bishop of Llandaff's case*, the end of it is "*adjournatur*:" (Comberbach, 305.) *R. v. Warren* (Cowp. 370); *Searle's case* (Hob. 121); *Slader v. Smallbrooke* (1 Lev. 138; Fitz. Nat. Br. 189); *Townsend v. Thorpe* (2 Ld. Raym. 1507); *Peat v. Birr* (Fitzg. 272); *Newcomb v. Higgs* (Fitzg. 189); *Rex v. Bridges* (1 M. & W. 145), were also cited or referred to.

Sir Thomas Staples, Q. C., and Darley, with whom was W. Woodroffe.—The plaintiff is entitled to a prohibition, the office of registrar is a ministerial office, and may be discharged by deputy (7 Bacon's Abr. 153; 2 Rolle's Abr. 285, plac. 37; 16 Vin. 554.) It is a free-

hold office, and the Ecclesiastical Court cannot remove a person from a freehold office. The case of *Jones v. The Bishop of Llandaff* (4 Mod. 28), cited at the other side, and also to be found in Comberbach Rep. 305 (*nom. Jones v. The Bishop of St. Asaph*), is in our favour. [BLACKBURNE, C. J.—But remember that there was no decision in that case.] As to *Sutton's case*, which has been relied on, it is also reported in Noy. 91, and from the reasons assigned for the decision, it is clearly to be distinguished from the present case. It was the case of a proceeding before ecclesiastical commissioners against Sutton, for taking on him the office of Chancellor of the Diocese of Gloucester, without being sufficiently learned in the canon and civil law. In *Webb's case* (8 Rep. 475), it is said that the proceedings in the Admiralty Court “be according to the civil law, yet the offices are determinable by the common law, so of a register of the consistory of a bishop,” (Brook's Abr. tit. “Grants,” 134 *ib.*) The only case at all in the plaintiff's favour is *Townsend's case* (2 Ld. Raym. 1507), and that case has been doubted. [BLACKBURNE, C. J.—Suppose an officer is guilty of some misprision or neglect, how is the court to act?] By the express words of the patent, Mr. Grace is authorized to appoint a deputy. [BLACKBURNE, C. J.—He may appoint a deputy, but he is still the principal.] Unless there has been a forfeiture of this office, there can be no removal by the Ecclesiastical Court. [CRAMPTON, J.—Suppose the party became a lunatic, and could not perform the duties of the office, would you say that the court has no power to remove him, because the incapacity has grown up after the appointment?] The registrars in Dublin are appointed by patent, and they invariably appoint a deputy: (*Curle's case*, 11 Coke, 4.)

GRACE  
v.  
LORD BISHOP  
OF OSSORY.  
  
Practice—  
Convicted  
felon.

*Francis Fitzgerald*, in reply.—By law, a man convicted of felony is ever after infamous, can it then be the law that he can hold such an office? Formerly, such a man could not be a witness; here the testimony of the applicant, as regards records, may be requisite, and though his disability as a witness is now removed, still there must have been formerly a power of removal somewhere, and they have not, on the other side, shown where the power of removal is. The suit in the Ecclesiastical Court involves no question belonging to the Temporal Court, it is a question belonging to the Civil Court alone, and therefore in this court the case of a parish clerk is in point. A parish clerk is a temporal officer, yet this court will not interfere to prevent his removal: (*Ex parte Bullock*, 14 Ves. sen. 452.)

*Cur. adv. vult.*

#### JUDGMENT.

BLACKBURNE, C. J.—This is an application by the registrar of Judgment. the diocese of Ossory, for a prohibition to stop the proceedings in the Ecclesiastical Court, by which it is sought to remove him from his office. The proceedings have been instituted by the Bishop, in consequence of Mr. Grace having been convicted of forgery,



GRACE  
v.  
LORD BISHOP  
OF OSSORY.

Practice—  
Convicted  
felon.

and sentenced to transportation for seven years. Two questions have been raised during the argument, one of them suggested by the court; and the first is—can a convicted felon be allowed to make such an application? The court are all of opinion that he cannot; my brother Perrin has supplied two authorities upon this point, which bear directly on the question: *Sir John Savage's case* (2 Dyer, 151; and Co. Lit. 130), where it is laid down, that “every person that is attainted of high treason, petty treason or felony, is disabled to bring any action; for he is *extra legem positus*, and is accounted *civiliter mortuus*,” and in accordance with this authority is the case of *Ex parte Bullock* (1 Taunt. 71), where Bullock, having been convicted of felony, and sentenced to death, Lord Eldon held that, being attainted of felony, his civil rights had ceased, and he could not bring a petition to supersede a commission of bankruptcy. (b) It is said, however, that there is no attainder, because the felony is not punishable with death: there is no authority for this position, as Patteson, J. observes in *Gray v. The Queen* (11 Cl. & Fin. 437), “at common law all felonies were capital,” so the attainder must attach when the crime was made a felony, though it was not punishable capitally. And, with reference to the second question, it has not been suggested that there is any other tribunal to which the matter could be referred, and the court are of opinion, that the proceedings to remove the officer of the bishop can be carried on in the Ecclesiastical Court, after the officer has been convicted of felony, and rendered unable to discharge the duties of his office, and it would be a public scandal and disgrace if the law were to be otherwise; if we required authority for our rule, it would be sustained by the cases of *Townsend v. Thorpe* (2 Ld. Raym. 1507); and *Sir John Savage's case* (2 Dy. 151.)

CRAMPTON, PERRIN, and MOORE, JJ., concurred in the judgment pronounced.

*Cause shown, allowed with costs.*

(b) And see also the case of *Bullock v. Dods* (2 B. & Ald. 258—275.)

## HOME CIRCUIT.

## HERTS LENT ASSIZES.

*February 28, 1850.*

(Before Mr. Justice MAULE.)

REG. v. JOSIAH CROUCH. (a)

*Evidence of handwriting—Expert witness.*

*A policeman who has only once seen a prisoner write, and that since suspicion has been excited against him with reference to the charge upon which he is tried, and upon an opportunity taken by the policeman with the view of being able to speak to his handwriting, is not an admissible witness to prove that a document, the foundation of the charge against the prisoner, is in the prisoner's handwriting.*

THE prisoner was indicted for feloniously sending a letter to Thomas South, threatening to burn and destroy his house, barns, &c.,—under stat. 10 & 11 Vict. c. 66, s. 1. It was proved that a letter, such as described in the indictment, had been received by the prosecutor, who lived at Hoddesdon, in Hertfordshire. To prove that the letter, the subject of the indictment, was the handwriting of the prisoner, a policeman was called who had known the prisoner previously, but had no previous knowledge of his handwriting until he was sent by his inspector after the letter had been received, and suspicions were aroused, to pay the prisoner some money owing to him from the witness, and with directions to procure a receipt from him, that he might see him write and be able to speak to his handwriting. The witness acted according to these directions, and it was proposed to ask him his belief as to the handwriting of the letter in question.

*T. Chambers* (for the prisoner) objected that this evidence was inadmissible, and relied upon the *Fitzwalter Peerage* case: (10 Cl. & Fin. 193; *Taylor on Evidence*, 1223.) It appears that in that case it became necessary to show that a family pedigree, produced from the proper custody, and purporting to have been made nearly a century ago by an ancestor of the claimant, was in fact written by him. An inspector of official correspondence was called as a witness, who stated that he had examined the signatures attached to two or three documents, which were admitted to have been executed by the same ancestor, that they were written in a remarkable character, and that his mind was so impressed with

(a) Reported by PAUL PARNELL, Esq., Barrister-at-Law.

REG.  
v.  
JOSIAH  
CROUCH.  
—  
*Evidence—  
Handwriting.*

that character as to enable him, without immediate comparison, to say whether any other document was or was not in the handwriting of the same person. It was objected that this witness had gained his knowledge of the handwriting, not from a course of business like the solicitor or steward of a party, but from studying the signatures for the express purpose of speaking to the identity of the writer. The Lord Chancellor (Cottenham) and Lord Brougham were clearly of opinion that the testimony was inadmissible.

*Rodwell* (for the prosecution) combated the authority of this case, and relied upon the earlier decisions and the language of the text-books.

MAULE, J., rejected the evidence. He said, "knowledge so obtained, that is to say, for such a specific purpose, and under such a bias, is not such as to make a man admissible as a *quasi-expert* witness. He does not come to speak to a fact, but as a witness of skill, to give his judgment upon a particular question. The only means he has had of acquiring a capability to form such judgment are not such as to make him a competent witness in that particular."

*Verdict, Not guilty.*

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## HOME CIRCUIT.

### ESSEX LENT ASSIZES.

*March 8, 1850.*

(Before Chief Justice WILDE.)

REG. v. BENJAMIN PETTIT. (a)

#### *Evidence—Inducement.*

*A statement elicited from a prisoner by questions put to him without any previous caution by a magistrate, before whom he is brought in custody upon a criminal charge, is not admissible against him in evidence at his trial.*

THE prisoner was indicted for the wilful murder of William Campling, by shooting him at Saffron Walden, in this county. It appeared that William Campling was shot and killed in Saffron Walden, about nine o'clock upon the evening of November 7th, 1849. On the same night, at about eleven o'clock, the prisoner was apprehended upon this charge, and was taken immediately in custody before the magistrates of the borough of Saffron Walden,

(a) Reported by PAUL PARNELL, Esq., Barrister-at-Law.

who assembled for that purpose. The clerk to the magistrates was not present, but his brother, an appraiser in the town, took notes of what passed, which notes were not signed by the prisoner, nor by the magistrates, nor by anybody else. The prisoner was asked one or two questions by the magistrates, to which he gave certain answers, after which he was remanded, being left in the custody of the constables who had apprehended him. It was proposed, upon the part of the prosecution, to put these questions and answers in evidence.

REG.  
v.  
BENJAMIN  
PETTIT.

Evidence—  
Prisoner's  
statement.

*T. Chambers* and *Parnell* (for the prisoner) objected that this evidence was inadmissible. The magistrates had no right, under any circumstances, to put questions to a prisoner. Their position and authority would necessarily exercise an undue force in compelling him to answer. Further, the magistrates are tied down by stat. 11 & 12 Vict. c. 42, ss. 17, 18, to a particular mode of procedure, from which they cannot deviate. In that mode of procedure one of the most important particulars is the caution to a prisoner before he makes any statement: (*Reg. v. Kimber*, 3 Cox Cr. Cases, 224.)

*R. Gurney* and *Johnson* for the prosecution.—This matter is within the proviso to sect. 18 of stat. 11 & 12 Vict. c. 42: "Provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission, or confession, or other statement of the person accused or charged, made at any time which by law would be admissible against such person." It may be the subject of remark to the jury where magistrates have so acted, but a statement of the prisoner, whether to an ordinary witness, a policeman, or a magistrate, is not to be excluded upon the mere ground of its having been elicited by a question.

*T. Chambers*, in reply.—To interrogate a prisoner is a mode of trial utterly inadmissible before judges of Oyer and Terminer and Gaol Delivery, and therefore still more objectionable before ordinary justices of the peace.

WILDE, C. J.—I think I ought not to receive this evidence, and I reject it upon the general ground that magistrates have no right to put questions to a prisoner with reference to any matters having a bearing upon the charge upon which he is brought before them. The law is so extremely cautious in guarding against anything like torture, that it extends a similar principle to every case where a man is not a free agent in meeting an inquiry. If this sort of examination be admitted in evidence, it is hard to say where it might stop. A person in custody, or in other imprisonment, questioned by a magistrate, who has power to commit him and power to release him, might think himself bound to answer for fear of being sent to gaol. The mind in such a case would be likely to be affected by the very influences which render the statements of accused persons inadmissible.

The evidence was accordingly rejected.

*Verdict, Not guilty.*

## HOME CIRCUIT.

## KENT LENT ASSIZES.

*March 19, 1850.*

(Before Mr. Justice MAULE.)

REG. v. ROBERT MILLER. (a)

*Practice—Depositions.*

*The deposition of a witness absent from illness, to be admissible under stat. 11 & 12 Vict. c. 42, s. 17, must be regular, and appear to have been regularly taken upon the face thereof, and cannot be proved by extraneous evidence to have been properly taken in fact.*

THE prisoner, Robert Miller, was indicted for burglary in the house of Thomas Allchin, in the parish of Dartford, and stealing a quantity of silver and copper coin, which were specified, amounting to 4*l.* 8*s.*, the moneys of the said Thomas Allchin.

It was proved that the prosecutor, who had been examined before the magistrate at Dartford at the time when the prisoner was committed for trial, was so ill as to be unable to travel, and it was proposed by *Rose*, for the prosecution, to put his deposition in evidence.

The deposition was in the following form:—

Kent, to wit.—The examination of Thomas Allchin, of the parish of Dartford, taken on oath, this 4th day of February, in the year of our Lord 1850, at Dartford, in the county aforesaid, before us, of Her Majesty's justices of the peace for the said county, in the presence and hearing of Robert Miller, who is charged this day before us, &c. [Then followed the statement of the charge on which he was committed].

This deponent, Thomas Allchin, on his oath saith, &c. [Then followed his deposition.]

This examination was taken before us, in the presence of the prisoner, at Dartford, on the day and year first above-mentioned.

HUGH JOHNSTON.

MAULE, J. was of opinion that this document was inadmissible under stat. 11 & 12 Vict. c. 42, s. 17, inasmuch as it did not purport to be signed by, or to have been taken before, any justice of the peace for the county in which the prisoner was examined and committed for trial.

*Rose*, for the prosecution, offered to show that Hugh Johnston, whose name was signed to the deposition, was a magistrate, and acting as such when the examination was taken; but

(a) Reported by PAUL PARNELL, Esq., Barrister-at-Law.

MAULE, J. said that such proof would not make the deposition purport to be signed otherwise than it did purport, and rejected the evidence.

The prisoner was undefended.

*Verdict, Not guilty.*

RSG.  
v.  
ROBERT  
MILLER.

## HOME CIRCUIT.

### KENT LENT ASSIZES.

March 25, 1850.

(Before Mr. Justice MAULE.)

REG. v. GEORGE KIPPS. (a)

*Abduction*—9 Geo. 4, c. 31, s. 20.

*It is no answer to an indictment under stat. 9 Geo. 4, c. 31, s. 20, for taking away a girl under the age of sixteen years, to show that the girl alleged to be abducted went voluntarily from her home in consequence of the persuasions of the prisoner, to a place at some distance, where she met the prisoner, and whence she went away with him without any reluctance.*

*Semble, the marginal abstract of Reg. v. Meadows (1 Car. & K. 399), is not law.*

THE prisoner was indicted under the stat. 9 Geo. 4, c. 31, s. 20, for abduction, in taking away one Charlotte Jeffery, a girl of the age of fifteen years, out of the possession and against the will of William Jeffery, her father. In the second count the offence was laid to consist in taking Charlotte Jeffery, out of the possession and against the will of Sarah Jeffery, her mother, and in the third count the girl was alleged to have been taken out of the possession and against the will of both, William and Sarah, the father and mother of the girl.

It appeared by the evidence that the girl, Charlotte Jeffery, was between fifteen and sixteen years of age, that the defendant was a married man of about forty years of age, who had for several months corresponded with the girl, and paid her the attentions of a lover, and had endeavoured to persuade her to leave her home, where she was living with her father and mother, and go away with him. He ultimately prevailed upon her, and made an engagement with her to meet him on Sunday evening, the 18th of November, at the churchyard gate of the church of the village, where they were both living, which accordingly she did, when they both left the village together. The appointment for this meeting had been made by mutual consent some days previously. The girl took

(a) Reported by PAUL PARNELL, Esq., Barrister-at-Law.

REG.  
v.  
GEORGE  
KIPPS.  
—  
Abduction—  
9 Geo. 4, c. 31,  
s. 20.

with her a bundle of clothes and a little money. After cohabiting with the prisoner two or three days, she was found with him by her friends at Sheerness, a place at a considerable distance from where the girl and the prisoner had previously lived. There was no suggestion of any force or fraud used by the prisoner in inducing the girl to consent to elope with him.

*Campbell* for the prisoner, submitted that there was no "taking away" of the girl by the prisoner within the meaning of the act of Parliament. It appeared that she voluntarily went to meet him, and of her own free will eloped with him. In *Reg. v. Meadows* (1 Car. & Kir. 399), Parke B. and Coleridge, J. held, that where the girl went away voluntarily with the prisoner, having been met in the road, and not going immediately from her home, the case was not within the statute.

*Deedes* for the prosecution.—The marginal note of that case is inconsistent with *Reg. v. Robins* (1 Car. & Kir. 456.) Besides, there is nothing in the language of the statute to require such a forced construction. In *Reg. v. Biswell* (2 Cox. Crim. Cas. 279), the girl quitted the house with the prisoner in consequence of a proposition to elope which emanated from the girl herself, after a declaration by her to him that she would leave the house alone, yet it was held that the prisoner was properly convicted of abduction.

*Campbell*, in reply.—There, there was a taking from the house; here, there is no taking from anywhere. They meet in the street and go off together.

MAULE, J.—If the construction apparently put upon the statute in *Reg. v. Meadows* be the right construction, the act can hardly ever be violated, except in the case of children in arms. It rarely or never happens that the abductor carries away a girl of fourteen or fifteen in his arms, or upon his back, so that such an interpretation would make the statute inoperative. The law throws a protection about young persons of the sex and within the age specified by the statute. It has been determined by the Legislature that at that age young females are not able to protect themselves, or give any binding consent to a matter of this description. It is therefore quite immaterial whether the girl abducted consent or not; if her family, that is to say, those who under the statute may lawfully have the possession and control over her, do not consent to her departure, the offence is completed. (b) *Verdict, Guilty.*

*Sentence, Two years' imprisonment: to pay a fine of 50l., and to be further imprisoned till the fine be paid.*

(b) The real facts of the case of *Reg. v. Meadows* (1 Car. & Kir. 399) do not warrant the marginal note. The defendant there, Mary Ann Meadows, was a girl who had formerly been a school-fellow of Allen, the girl alleged to have been abducted, and was probably very little older than Allen herself. Allen was out at service, and had been sent upon an errand by her mistress, Mrs. Tomba. As she was returning she met Mary Ann Meadows, who proposed to her to accompany her to London, upon a representation that Mrs. Meadows, her mother, wanted a servant and would engage her. They both then went away together at once. If this had been held to be abduction, any two school-girls playing truant in company might have been indicted respectively, each for abducting the other.

## HOME CIRCUIT.

## KENT LENT ASSIZES.

Monday, March 25, 1850.

(Before Mr. Justice MAULE.)

REG. v. JAMES TAFFS. (a)

*Embezzlement—Benefit Society.*

*A member of, and secretary to, a benefit society, deriving a per centage from the funds of the society, received, in the course of his duty, certain moneys from the members of the society, which it was his duty to pay into an account in the savings bank, kept in the names of certain other members of the society. Instead of paying the money into the bank, he appropriated it.*

*Held, that he could not be convicted of embezzling the money upon an indictment charging him to be the servant of "A. B. and others," and laying the money to be that of "A. B. and others," A. B. being an ordinary member of the society.*

**JAMES TAFFS** was indicted for embezzlement. The 1st count of the indictment alleged that, upon the 27th of June, A. D. 1849, the prisoner was clerk and servant to James Dean and others, and, being such servant, feloniously did embezzle the sum of 70*l.* which he had received on account of his said masters. The 2nd count charged him in the same manner with an embezzlement of the sum of 6*s.* 8*d.* within six months of the committing of the felony in the 1st count mentioned. The 3rd count charged a larceny of 70 sovereigns, 140 half-sovereigns, &c. &c. (describing the coin requisite to make up the sum of 70*l.* in every possible manner), the moneys of James Dean and others. The 4th count was similar with reference to a sum of 6*s.* 8*d.*

It appeared that James Dean, the prisoner, and a great many other persons, were members of "The United Kentish Brothers Benefit Society," holden at Chatham, in Kent. The prisoner was employed as secretary to the society, and it was his duty, as such, to receive and pay into the savings bank, or deposit in the box of the society, all the subscriptions, fines and other payments of members of the society. The society was unenrolled, and there were no trustees. James Dean was an ordinary member of the society. The prisoner received, as a remuneration for doing the work of

(a) Reported by PAUL PARNELL, Esq., Barrister-at-Law.



REG.  
v.  
JAMES TAPPS.  
—  
Embezzlement-  
Benefit society.

secretary, 2*d.* per head per quarter, upon every member of the society, including himself.

The account was kept in the savings bank in two books, and two separate accounts, each in the name of four different members, who were called the stewards for the year, as depositors, and who were changed from time to time. Of the stewards for the year, four served for each six months, and it was their duty, at the monthly meetings, which were held on the first Monday in each month, to collect the subscriptions in the room of meeting from all the members, and to hand them to the secretary, whose duty it was to receive them, and dispose of them according to their amount. If the amount collected exceeded 5*l.* after a certain deduction for what was called the sick stock, it was the duty of the secretary to carry it to the savings bank on the following Saturday; if it were under 5*l.* his duty was to put it into a bag in the society's box, which was kept at the house where the meetings were held. The box had three different locks: two of the keys were in the hands of the stewards, the other in those of the secretary. The box could not be opened without all three keys. When the money was in the savings bank the secretary had no control over it.

It was discovered, in June, 1849, that about 50*l.* which had passed through the prisoner's hands in the few preceding months, and which ought to have been carried to the savings bank, had not been so carried, and was deficient.

*Parnell*, for the prisoner, objected that the indictment could not be sustained. First, The prisoner was not the servant of "James Dean and others," for "others" must of necessity include himself. He cannot be his own servant, or the servant of the rest of the members of the society. He is a partner with them, and the money alleged to be embezzled being the money of "James Dean and others," is his own money. Secondly, This cannot be embezzlement, for the money alleged to be embezzled was never out of the possession of the supposed masters, whereas embezzlement is of money which is never brought actually into the possession of the master. Here the money passed from the members to the stewards, who are also members of the society, and thence to the prisoner, who is also a member; in all these steps, the money was throughout in the actual or constructive possession of "James Dean and others."

*Knapp* and *F. Smith* for the prosecution.—This case is within the principle of the decided cases. Though a member of the society, the prisoner may still be a clerk or servant to it, if employed in that capacity, and the mode of his remuneration is immaterial. The payment to him of 2*d.* per head for each member is sufficient to make him a servant: (*Rex v. Hartley*, R. & R. 139; *Rex v. Hall*, 1 Mood. C. C. 474.) Secondly, Though this was the society's money in course of transit to the members of the society, in whose names it was to be entered at the savings bank; this is embezzlement: (*Rex v. Hodge*, 2 Leach, 1033; S. C. R. & R. 160; *Reg. v. Masters*, 1 Den. C. C. 332.)

*Parnell*, in reply.—In *Rex v. Hall*, the prisoner was alleged to be the servant of the trustees of the society who were not members. In *Rex v. Headge*, the money was in the hands of a third party distinct from the master, and in transit to the master. “James Dean” is not a steward or depositor, so that “James Dean and others” can only mean the other members of the society.

REG.  
v.  
JAMES TAFFS.  
—  
Embezzlement-  
Benefit society.

MAULE, J.—These objections must prevail. The business of the prisoner was to receive the money, and pay it into the savings bank in the name of some members of the society. He is alleged to be servant to James Dean and others, but he is no otherwise servant to James Dean and others than as interested with them in the fund, and as doing something for the benefit of the whole society. “Dean and others” are in no special position as masters to him; he is, rather, in the nature of a partner, having an advantage over the other partners, by reason of an allowance to him for doing more of the work than the others do. The money is not the money of James Dean and others, except in so far as it is the money of the prisoner and James Dean and some other persons. Before the statute 7 Geo. 4, c. 64, s. 14, which enabled the persons framing an indictment to describe partners as “others,” the names of all the members of this society must have been set out. If the name of the prisoner, or of any other member, had been omitted in the enumeration of the members, there would have been a failure in the proof. If the name of the prisoner had been inserted, the indictment would have been bad on its face, for it would have charged the prisoner with embezzling his own money.

*Verdict, Not guilty.*

COMMISSION OF OYER AND TERMINER, AND  
GENERAL GAOL DELIVERY FOR THE COUNTY  
OF THE CITY OF DUBLIN.

December 19 and 22, 1848.

(Before PERRIN, J., and RICHARDS, B.)

REG. v. CHARLES GAVAN DUFFY. (a)

*Indictment—Practice—Qualification of grand juror—Plea in abatement—Pleading two pleas at same time.*

*The prisoner pleaded in abatement that one of the grand jury, P. B., by whom the indictment was found a true bill, was not, at the time of his being sworn upon the grand inquest, nor at the time of the finding the bill of indictment a true bill, "An inhabitant of the county of the city of Dublin, or resident within the same, or a freeman of the city of Dublin, or a burgess of the said city, or seised or possessed of or entitled to any property within the said county of the city, in respect of which he, the said P. B., was liable to be rated to the relief of the poor, or for county, parish or municipal rates or taxes."*

*Held, on demurrer, that the plea was bad, inasmuch as it did not negative the existence in the grand juror of every possible qualification, and he might consistently therewith be a good, honest and lawful man of the county of the city of Dublin.*

*Semble, that to an indictment two separate pleas may be pleaded in abatement.*

*Semble, also, per PERRIN, J., that the statute of 3 & 4 Will. 4, c. 91, applies to grand juries at Commissions of Oyer and Terminer and General Gaol Delivery.*

Plea in  
abatement.

THE court having refused the motion to quash the indictment in this case, the prisoner, upon being called on to plead, tendered the two following pleas in abatement, which he duly verified by affidavit: "And now on this day, that is to say, Monday, the 18th day of December, in the year of our Lord 1848, the said Charles Gavan Duffy, being led to the bar of the court here by the High Sheriff of the county of the city of Dublin, and having heard the said supposed indictment read, protesting that he is not guilty of the offences in the said supposed indictment specified, or any of them; for plea in abatement nevertheless saith that he ought not to be compelled to answer the said supposed indictment, and that the same ought to

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

be quashed, because he saith that Walter Sweetman, one of the jurors aforesaid, by whom the said supposed indictment was found a true bill as aforesaid, was not, at the time of his being sworn on the grand inquest aforesaid, nor at the time of his finding the said supposed indictment a true bill, as aforesaid, an inhabitant of the county of the city of Dublin, or resident within the same, or a freeman of the city of Dublin, or seised of any estate of freehold in the said county of the city of Dublin, and this he the said Charles Gavan Duffy is ready to verify; wherefore he prays judgment of the said indictment, and that the same may be quashed, and so forth.

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
Pleading—  
Grand jury.

“And for a further plea in this behalf, the said Charles Gavan Duffy, protesting as he hath above protested, saith that he ought not to be compelled to answer the said supposed indictment, and that the same ought to be quashed; because he saith that Patrick Boylan, another of the jurors aforesaid by whom the said supposed bill of indictment was found a true bill, as aforesaid, was not, at the time of his being sworn on the grand inquest aforesaid, nor at the time of his finding the said supposed indictment a true bill, as aforesaid, an inhabitant of the county of the city of Dublin, or resident within the same, or a freeman of the city of Dublin, or a burgess of the said city, or seised, or possessed of, or entitled to any lands, tenements or hereditaments within the said county of the city, for any estate of freehold, or any less estate, or entitled to any property within the said county of the city, in respect of which he, the said Patrick Boylan, was liable to be rated to the relief of the poor, or for county, parish or municipal taxes, and this he the said Charles Gavan Duffy is ready to verify; whereupon he prays judgment of the said indictment, and that the same may be quashed, and so forth.”

Pleas.

To both these pleas demurrer by the Attorney-General—Joinder in demurrer.

December 19.

Before the demurrer was argued, *Butt*, Q. C. applied to the court that the Attorney-General might be compelled to take some course with reference to the indictment pending against the prisoner in the county.

*The Attorney-General*.—If the pleas in abatement to the indictment found by the city grand jury are held good, it will have the effect of quashing that indictment, therefore the crown ought not at this stage of the proceedings to be compelled to take any particular course as to the indictment found in the county. There is no intention of harassing the prisoner. If the general issue had been pleaded, and a trial could be had upon the city indictment, the case would be different.

The Attorney-General for the crown.

PERRIN, J.—We will not now call upon the crown to quash the county indictment, but will hear the argument of the demurrer.

*The Attorney-General (Monahan)*, in support of the demurrer.—This course is objectionable in point of form, for the prisoner has no

REG.  
v.  
CHARLES  
GAVAN DUFFY.

Pleading—  
Grand jury.

The Attorney-  
General for the  
crown.

right to plead two separate pleas (1 Chit. C. L. 434.) In Archbold's Pleading in Civil Cases, 305, 2nd edit., under the head of Plea in Abatement, it is laid down that a defendant shall not plead two pleas in abatement, which go to the whole declaration, and in Comyn's Dig. tit. "Abatement," I. 3, it is laid down that a party shall not plead two pleas in abatement. But the pleas are bad in substance. The prisoner states by his plea that at the time the bill was found a true bill as aforesaid, Patrick Boylan was not an inhabitant of the county of the city of Dublin, or resident within the same, or a freeman of the city of Dublin, or a burgess of the said city, or seised or possessed of any lands, tenements or hereditaments, within the said county of the city, for any estate of freehold, or any less estate, or entitled to any property within the said county of the city, in respect of which he the said Patrick Boylan was liable to be rated to the relief of the poor, or for county, parish or municipal taxes. But I submit that residence is not necessary, and that at common law there is no qualification for a grand juror at a commission of Oyer and Terminer, except that he should be *probus et legalis homo*. It is not necessary that he should reside in the county, nor that he should be a freeholder; and even if it be wrong of the sheriff to summon him, still it is not objectionable in this way: there is no allegation here that Mr. Boylan is not *liber et legalis homo*; a plea of this kind must, to be sustained, negative *all* the qualifications which would render a party competent, and it is quite consistent with this plea, that this gentleman is a merchant carrying on business with his partner, but not residing in Dublin, and though he might have no rateable property in Dublin, still he might, consistently with anything alleged by the prisoner, well be described, as he is in the sheriff's return annexed to the writ, as *of Grafton Street, in the City of Dublin, Merchant*: (2 Hale P. C. 154, 155.) In p. 154 he gives the forms of precepts for summoning a grand jury.

In the precedents it is said that he shall summon to sessions of peace jurors *quorum quilibet habeat, 40s. de terris et tenementis liberi tenementi*; but in Commissions of Oyer and Terminer the form of precept given is *probos et legales homines de quolibet hundredo comitatu prædicto ad inquirendum, &c., quæ ex parte domini regis adtunc et ibidem eis inpurgerentur quam alios viginti quatuor probos et legales homines de com' prædict' ad faciend' Juratam inter dominum regem et prisiones prædictos*, omitting the freehold qualification, and that precedent is taken from Coke's Entries, fol. 55, a. Now it is a little remarkable that this doctrine of their being freeholders has been overruled by the judges in England: (Russell & R. 177.) [PERRIN, J.—What is the name of the case?] There is no name to it. It was a case laid before the judges for the regulation of the practice, and it was decided that it was not necessary that there should be freeholders upon the grand jury. In *Sheridan's and Kirwan's case* (31 St. Tr. 575), which was an indictment found by the grand jury of the city of Dublin in the Queen's Bench, and in which case one of your lordships was counsel, it was held not to be a necessary qualification. There was a plea in abatement

that many of the grand jurors were not freeholders. In the argument it was conceded, upon the authority of the doctrine in *Hale*, P.C. (155, edit. of 1800), that a freehold was a necessary qualification for a grand juror in a county at large, but it was contended by the Attorney-General that in the city it was sufficient if the grand jury were freemen, and that qualification not having been negatived by the plea, the demurrer was allowed. I admit that in that case the counsel seem to have gone all through on the opinion that the passage in *Hale* meant, by "*liber homo*," a freeholder, but I submit that the meaning of *liber homo* is a freeman in contradistinction to a villein, and that *legalis* is used in contradistinction to an outlaw. *Liber* does not, I submit, mean "possessed of a freehold interest," and the old authorities show that even in a county at large it was not necessary that a grand juror should have a freehold. 13th Edw. 1, c. 38, intituled, "How many, what sort of persons, shall be returned in juries and petit assizes, and of what age they shall be," shows this. The statute 21 Edw. 1, c. 2, "*De iis qui ponendi sunt in assisis*," provides that the sheriffs shall not put any persons on the grand jury in their county, who have not lands to the value of 40s., but, according to Coke's Commentary on the statute (2 Inst. 447, 448), if any party be returned contrary to this act, he cannot be challenged, but his remedy is against the sheriff by action; and it is said that there is no instance of an indictment being quashed for a defect of a juror, except a case under the 11 H. 4, c. 9, in which there is an express provision on the subject, that an indictment found contrary to its provisions, by disqualified jurors, shall be void and revoked. Amongst all the reported cases, the only one of an application to quash an indictment for a defect in a juror being successful, is *Withipole's case* (Cro. Car. 134; S. C. Sir W. Jones, 198.) Coke (3 Inst. 32) refers to the points resolved in *Scarlett's case*, at Bury, upon this statute, amongst which was this, "that where a person by fraud was sworn upon a grand jury, though not returned, the panel was void, although all the rest were duly returned." Your lordships will probably be referred to a passage in Hawk. P. C. (lib. 2, c. 25, s. 16), which is the only one which seems to give a colour to the position that non-residence is an objection; he says the indictment "must be found by twelve men at the least, every one of whom ought to be of the same county, and ought also to be a freeman, and a lawful liege subject," and refers to *Flack's case* (2 Roll. Rep. 82.) "Flack was indicted of murder, and the indictment was *inquisitio capta coram*, &c. *per sacramentum*, and it does not say *proborum et legalium hominum*, and it does not show what county; and for that it was reversed." That is the whole report of the case which was decided in Easter Term, in the 17th year of Jac. 1, but where it came from, and how it came to the court, does not appear. In the argument in *Martin v. The Queen* (3 Cox C. C. 318), lately before the Queen's Bench, several cases were referred to, in which it was objected that they were not said to be *probi et legales*,

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
Pleading—  
Grand jury.

The Attorney-  
General for the  
crown.

REG.  
v.  
CHARLES  
GAVAN DUFFY.

Pleading—  
Grand jury.

The Attorney-  
General for the  
crown.

in some of which it was said to be a good objection, and in some not, but I am not aware of any case in which it has been decided that non-residence alone was a good objection; it was not alleged in *Kirwan's case* that it was necessary. In the Statute of Additions (1 Hen. 5, c. 5), it is enacted, that "in every original writ, &c. additions shall be made of their estate, or degree or mystery, and of the towns or hamlets or places and counties of the which they were or be, or in which they be or were conversant." But suppose that we take this statement of Hawkins out of the case, this gentleman may be very well described as he is on the panel, as a good and lawful man of the city of Dublin, though he does not reside there; he may be Mr. Boylan, of Grafton-street, in the city of Dublin, carrying on trade in Dublin with his father, and may himself reside in Kingston or Rathmines. [In answer to the court, the Attorney-General admitted that, in the case of petty jurors, residence was necessary, as had been held in a recent case in this court.] Those statutes which have been passed directing sheriffs to return persons of certain property on juries, whether they have been repealed or not, were merely for the ease of jurors. The present Jury Act, 3 & 4 Will. 4, c. 91, does not refer to grand jurors at Commissions of Oyer and Terminer, and there is nothing in the statute to show what the qualification of a grand juror is to be, and it is confined to juries for the trial of "issues" and grand juries at sessions of the peace. It may be argued that the 3rd section uses general words which would extend to all grand jurors, but, being used in a limited sense in the 1st section, they must, I submit, have the same meaning in the 3rd. It also provides what shall be causes of challenge, but it does not provide that any objection can be taken to an indictment on the ground of an objection to a grand juror. I argue from that, that it does not apply to grand juries, or that, if it does, the provisions are only directory to the sheriff, and that it is not the intention that the proceedings at an assizes should go for nought where a man, apparently perfectly competent, has been a grand juror, as in the present case, at the end of an assizes, and when (as I believe is the case here) the grand jury have been discharged; in every one of the statutes which regulate the qualifications of grand jurors (6 & 7 Will. 4, c. 116, s. 31; 7 Will. 4, and 1 Vict. c. 2, s. 9); there is a provision that an omission by the sheriff shall not vitiate an indictment, and if otherwise, it would be very inconvenient, for a number of gentlemen are called, of whom, until they are called in court, correctly described, a party can know nothing: the sheriff returns whom he pleases. Most of the old statutes on the subject have been repealed by the 3 & 4 Will. 4, c. 91. The only statute now in force on the subject, where a property qualification is required of a grand juror, is the 26 Geo. 3, c. 14; and, under that, he is, by the 3rd section, *before* he is sworn, to be interrogated as to the amount of his property: (Hayes Cr. L. 356.) *Sheridan's case* decided that an objection cannot be taken to a

particular grand juror by challenge. This might occur: a party might have property in a county at the time of receiving the precept, then, just before he is about to be called, he might change his residence and thus frustrate the proceedings. Therefore, I submit that the provisions of this statute are merely directory, and that this objection does not vitiate the indictment, and that where it is otherwise, as in the case of the statute of Henry, it is expressly so stated. *Reg. v. Whitehead* (1 Cox C. C. 199) may be cited at the other side, but it is not an authority on this question. It was decided on a different point; on the whole, I submit that the pleas are bad, being double, and also bad in substance, and that therefore we are entitled to judgment upon them.

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
Pleading—  
Grand jury.

*John O'Hagan*, contra.—First, as to the form of these pleas there is this distinction between a dilatory and a peremptory plea, that the former may contain double matter. In 2 Hawk. P. C. 266, edit. of 1824, referring to the Year Book, 4 Hen. 6, fol. 15, "there seems to be no doubt but that if a defendant in an appeal, or even in an indictment of felony, think it proper to make use of never so many pleas or exceptions of this kind, requiring all of them the same kind of trial, he may take advantage of them all, unless they be repugnant to one another." In *Sheridan's case* (31 St. Tr. 543), two pleas were pleaded in exactly the same way as we have put them in here, and Mr. Saurin, the then Attorney-General admitted that in one plea several matters might have been pleaded in abatement. The cases cited by the Attorney-General were civil cases, but the contrary cases to which I refer were criminal cases. Now, as to the matter of the plea, I shall address my argument to the plea put in as to Mr. Boylan, for it includes all that has been alleged as to Mr. Sweetman. By denying that Mr. Boylan is an inhabitant of the city of Dublin, we deny not merely his having a residence, but also that he eats his meals there, or has any occupancy. The word "inhabitant" which we have used, is the largest which can be used. In 2 Coke Inst. 702, commenting on 22 Hen. 8, c. 25, the meaning of the term "inhabitant" is described: "*Habitatio dicitur ab habendo, quia qui propriis manibus et sumptibus possidet et habet ibi habitare dicitur*;" secondly, "if a man dwelleth in a forraigne shire, riding, city, or toun-corporate, and keepeth a house and servants in another shire, &c., he is an inhabitant in each, &c. within the statute;" and "thirdly, *ex vi termini*, every person that dwelleth in any shire, riding, city, or town-corporate, though he hath but a personal residence there, yet is he said in law to be an inhabitant, or a dweller there, has servants, &c., but this statute extendeth not to them, but to such as be householders." He (Coke) conceived that it did not extend to a servant, but that it extended to every person who had a visible occupancy; the Attorney-General has argued that it may be that Mr. Boylan transacts business as a merchant, without having any residence in Dublin, but how could a man be a merchant in the city of Dublin, carrying on business, without

O'Hagan for  
the prisoner.



REG.  
v.  
CHARLES  
GAVAN DUFFY.  
Pleading—  
Grand jury.

O'Hagan for  
the prisoner.

having some land, tenement, or hereditament; how could he have a place to store his goods in without being liable to rates? By common law it is absolutely necessary that, to be a grand juror, there should be the possession of property or occupancy, or that the person should prove himself an inhabitant by residence: (2 Hale P. C. 154; 1 Chitty Cr. L. 333; 3 Coke Inst. 30, 31; 2 Hawk. 307.) "It seems clear that by the common law, every indictment must be found by twelve men at the least, *of the same county*," &c. (2 Hawk. P. C. 295, E., Complete Jurymen, 11-16); and in 4 Bl. Com. 302, the passage I have cited from Hale is repeated. Such are the uniform statements of the text writers, but in so stating they do not go beyond the exigency of the writ under which they are summoned, or the statement in the caption, from which it must appear, not merely that they are good and lawful men, but also from the body of his county. The Attorney-General has contended that it has been held unnecessary so to allege: (*Rex v. Forrest*, Sir J. Ray. 433.) To the case of *R. v. Cole*, (2 Keb. 284, 292), and *R. v. Sparrowhawk* (3 Keb. 807), I admit these observations may in some degree apply, but even in those cases it appears the words "body of the county," are the most necessary not to be omitted, as it would be presumed, until the contrary be shown, that the jurors were *probi et legales*. But how could it be presumed that they were of the "body of the county?" If the case rested merely on the terms of the writ, and the necessity for such words appearing in the caption, he might contend that the law would not stultify itself by tolerating their omission, but our argument is fortified by the consideration of the duties cast by law upon grand jurors. They are to inquire of crimes committed in their county, to present rates, &c. therein, and their duties are essentially local in their nature, for they may, of their own local knowledge, present for a crime, without any bill of indictment having been sent up to them. I need not cite authorities for that proposition. In the Complete Jurymen's Guide, p. 32, referring to the remarks of Sir John Hawley, Solicitor-General in the reign of William the Third, it is said, "To what end is a jury to be returned from the vicinage, as a man cannot see by another's eye, or hear by another's ears?" he then argues that they might find against the judge of their own knowledge, being men of the locality. How can it be presumed that the duties of grand jurors are to be performed by strangers? Is it to be allowed to the sheriff to go out of the city of Dublin into the county of Dublin, or of Cork, for where is the line to be drawn to summon a grand jury? If any liege subjects of Her Majesty are admissible, might he not go down to the quay and take a crew out of any Canadian vessel to be the grand inquest of the county of the city of Dublin, and if Mr. Duffy were now indicted by such a crew of Canadian sailors, what more could he aver by his plea than he has done here? I need not cite authorities to show that if any one of the grand jury is disqualified the indictment is bad. [PERRIN, J.—It is quite clear. RICHARDS, B.—He

might be one of the twelve who found the bill. PERRIN, J.—The only way to obviate the objection would be that the bill should be signed by the twelve who found it.] In his observations on the *Articuli super Chartas*, stat. 34 Edw. 1, c. 9, Lord Coke says there must be in jurors two qualities, viz.: “two of the most, and one of the least, that is most neare the place, most sufficient and least suspicious.” I fully admit that the statutes of the 13 Edw. 1, c. 38, and 21 Edw. 1, c. 2, were only intended to give relief to persons summoned on juries. The words of the statute are, “*tempore summonitionis infirme vel in patriâ non commorantes in comitatu*,” although they might be qualified by having residence or qualification in both counties, but it is absolutely assumed on the face of that statute that he must have property in the county to qualify. It says, “neither shall this statute be taken to extend to great assizes in which it behoveth many times knights to pass not resident in the county for the scarcity of knights, so that they have land in the shire.” At the great assizes court it often happened that the knights, though having freehold lands in the county, had not residences, and so the assizes might not be taken, and therefore the statute made it enough that they should have property in the county; but supposing a man had no property or residence in a county, how could he be vexed by being summoned? He might laugh at the summons of the sheriff. All through the old statutes habitancy and occupancy must have been assumed to be requisite. By 2 Hen. 5, stat. 2, c. 3, a party must, to be a juror, be possessed of lands or tenements to the yearly value of 40s. This statute, being general in its terms, was held to extend to cities, boroughs, and towns, and being inconvenient, was partially repealed by the statute 23 Hen. 8, c. 13, which is not in force in Ireland, and which qualified every person who enjoyed the liberties of any city where he dwelt, and made his abode. What was the necessity for this statute if a sheriff could go to an adjoining county for jurors? It was passed in consequence of the exigence of the writ and the requirements of the common law. In *Lord Russell's case* (3 St. Tr. 634, folio edit.), a challenge was made to the foreman of the jury that he was no freeholder. Why not in that case have gone outside the county for freeholders, except that it was necessary that they should be inhabitants? In *Sheridan's case*, the Attorney-General argued that, in consequence of the difficulty of getting freeholders in cities it was sufficient if the jurors were freemen, but he did not suggest any other qualification, and the court, thinking that that qualification was sufficient, the challenge not having negatived it, was disallowed. If the argument of the Attorney-General in *Sheridan's case* be correct, the sheriff might have gone to Galway and brought any number of freeholders from it; and in those times of heat and acrimony, they, if they had been qualified, might not have been unwilling to have come. The 3 & 4 Will. 4, c. 91, prescribes the qualifications of grand jurors at quarter sessions. They must be

REG.  
“  
CHARLES  
GAVAN DUFFY.  
—  
Pleading—  
Grand jury.

O'Hagan for  
the prisoner.

REG.  
CHARLES  
GAVAN DUFFY.  
—  
Pleading—  
Grand jury.

O'Hagan for  
the prisoner.

resident merchants, freemen, and householders: (*R. v. Adlard*, 4 B. & C. 772; and *R. v. The Inhabitants of North Curry*, 4 B. & C. 953.) If an indictment was found at the sessions of the peace in the Recorder's Court, it would be a good plea that the party was not resident. Is it, then, to be supposed that the Legislature would have left grand jurors at the more important Sessions of Oyer and Terminer to be called by the sheriff, if he pleased, from all the four winds of heaven? As to the argument, that though the juror is disqualified, it is no plea for us, the court would, I think, be slow to hold that a prisoner might be executed where the proceedings were wrong from the very commencement; such a course would be abhorrent to the principles of the law. In *Rex v. Kirwan* (31 St. Tr. 573), it was decided, independent of the statute 11 Hen. 4, that if a grand juror is disqualified, the proper way to take the objection is by plea in abatement, and not by challenge. It was perfectly conceded that that was the proper course. The question decided in *Russ. & R.* 177, did not arise on a plea or demurrer. It is there stated, that in London the grand jury are usually leaseholders or householders; but was it ever ruled that they should have no qualification? The cause of a freehold formerly being held to be absolutely necessary as a qualification, was probably that terms for years were formerly not contemplated by the law, and the court may have held that in London the jurors, being leaseholders or substantial householders, was a sufficient qualification. Sir Colman O'Loughlin has referred me to a case not reported, *Wm. O'Reilly's case*, which was a case removed from this court by *certiorari*, and the present Lord Chief Justice Blackburne (who was then Attorney-General), in Hilary Term, 1832, entered a *nolle prosequi*. The argument relied on by the crown is, that Mr. Boylan may carry on business for, and in partnership with, his father, but in such case it would be impossible to say that he would not be an inhabitant: he could not be a partner without being an inhabitant; as to the time of our taking this objection, we have taken it at the proper time, and we cannot help the sheriff returning illegal persons on the panel, or the grand jury being now discharged. The fact of the statute (26 Geo. 3, c. 14), making it necessary to return persons from particular baronies shows that, when such objection applies, it would be a good plea. The consideration of inconvenience ought to have no weight in a case of this kind, where a man's liberty is involved; as to the argument that a man, though a good juror at the time of his being returned, might part with his qualification before he found the bill, that state of facts might be a good answer to a proceeding against the sheriffs, but our time to object to a juror is when he comes to find the bill; as the time to object to a petty juror is when he comes to take the oath. The Attorney-General has not cited any case of authority or dictum to show that a man might be a grand juror who had not a property qualification or occupancy. We have in our favour the exigency of the writ; we have

also all the old statutes, and the arguments drawn from the local functions which grand jurors are called on to discharge; any other decision would tend to establish the wide, vague and monstrous proposition, that the sheriff might bring persons from any county in the world to assess the county of Dublin: (Gilbert's C.P. 95; Bac. Abr. tit. Juries, E. 3; *Sheridan's case*, 31 St. Tr. p. 21, per Day, J.; Bac. Abr. tit. Juries, A. vol. 4. *Re Nowlan*, 2 Jebb & S. p. 1.)

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
Pleading—  
Grand jury.

*Napier, Q. C.*, on the same side.—No statute has been referred to by the Attorney-General to show that such a person as Mr. Boylan, who has property in the city of Dublin, and is not resident, nor a freeman, or a burgess, is qualified to act as a grand juror. What principle of common law, what decided case, what analogy can be brought to support the proposition of the Attorney-General? I have not been able to discover a single instance in which it has been held that a man could discharge the functions of a grand juror, where he had not a freehold in a county at large, or in a corporation, was a freeman, or had a property qualification; the statute 11 Hen. 4, favours our objection as regards duplicity (2 Hawk. c. 23, s. 128; Co. Lit. 303 (a), Commentary on p. 504 of Littleton.) The Attorney-General has referred to old statutes to show that the remedy is only against the sheriff, but these old statutes do not refer to the qualification of jurors, but to the way in which persons were to get off being jurors. Fitzherbert, in his "*Natura Brevium*," p. 165, gives the writs by which a juror is to get himself excused. These statutes were made for cases where men, otherwise qualified, were not at the time resident in the hundred, and all the writs refer to that state of facts. Coke, in his Commentary upon Littleton, section 234, says, he that is of a jury ought to have three properties; "first, he ought to be dwelling most near to the place where the question is moved; secondly, he ought to be most sufficient both for understanding and competency of estate; thirdly, he ought to be least suspicious; that is, to be indifferent as he stands unsworn, and then he is accounted in law *liber et legalis homo*; otherwise he may be challenged and not suffered to be sworn;" and, in the same book, p. 157, he must have a freehold in that county where the cause of action arose, "and though he hath in another, it sufficeth not, for want of sufficiency of freehold." That answers one of the Attorney-General's objections; his general qualification as a juror is taken to be necessary at the time of his being sworn, but his particular qualification as to his being of the hundred, was necessary at the time of his being summoned. No doubt *Kirwan's case* establishes that it is not necessary that a juror in a city should have a freehold (Hawk. Abr. Co. Litt. 248, 249; Gilbert's C. P. 95; Bac. Abr. tit. Juries, E. 3; *Sheridan's case*, 31 St. Tr. 621, per Lord Downes, and per Day, J.; Bac. Abr. tit. Juries, A.); and so particular was the law that there should be freeholders on juries, that it was held at common law that a freehold in ancient demesne on trial of a minor was not enough: (Co. Lit. 1566.) It is not necessary for me

REG.  
v.  
CHARLES  
GAVAN DUFFY.

Pleading—  
Grand jury.

to contend that the act of 3 & 4 Will. 4, c. 91, applies to grand jurors, but it would be a very anomalous thing that where it requires residence for petit jurors, who are to try the issue, it should not require it for grand jurors who are to find the bills: (*In re Nowlan*, 2 Jebb & S. 1.) The Irish Municipal Corporations Act, in the 179th section, provides that persons who, being burgesses by 3 & 4 Will. 4, c. 91, would be qualified and liable to serve on grand juries "at sessions within such borough, and also upon juries for the trial of all issues joined in any court of sessions of the peace," &c., within the borough. Now that provision being introduced to enable burgesses to serve, would it not be a strange thing to say the common law would allow a man to be a grand juror in this court without any qualification? Up to the time of *Rex v. Sheridan*, it had not been decided that a person who had not a freehold could be a grand juror, but in this case the court are called on to go a step further, and to say that a man who has no rateable property or qualification can be a grand juror of this high court, and that a party has no power of objecting to it. As to pleading double, would it not be a very hard thing that, if one of those who found the bill was an alien and a minor, the prisoner could not avail himself of both grounds of objection? (*Chitty v. Dendy*, 4 Nev. & M. 842.) [PERRIN, J.—I think that there is great weight in your answer to that objection, unless we are coerced by authority, and that it would be hard that where, if there were a challenge, the party would be bound to put all those objections in it, that in a plea in abatement, which in this case is substituted for it, he cannot take advantage of this objection.]

O'Brien in reply.

*O'Brien*, Serjt. in reply.—The authorities cited by the Attorney-General upon pleading double matter have received no answer. 1 Chit. Cr. L. 434, lays down that in a criminal case more than one plea in abatement cannot be put in. In 2 Hawk. P. C. 2 lib. c. 23, s. 128, it is said, "As to the sixth point, whether the appellee may have more than one such plea or exception, there seems to be no doubt, but that if a defendant in an appeal, or even in an indictment for felony, think it proper to make use of ever so many pleas or exceptions of this kind, requiring all of them the same kind of trial, he may take advantage of them all, unless they be repugnant to one another," and there are several cases cited in the margin, but they apply to cases of appeal. Pleadings in criminal cases cannot be in a better position than civil pleadings were before the statute of Anne, and if before the statute of Anne, (Arch. Cr. Pl. 306, edit. of 1821), it is said a defendant shall not plead two pleas which go to the whole declaration. If a defendant could not have pleaded two pleas in abatement in a civil case, on what ground can he now plead two pleas in a criminal case? The first plea in this case is clearly bad; it asserts that Mr. Sweetman is not seised of any estate of freehold, but he may consistently with the plea be possessed of leasehold property. As to the other plea, if I can show that there are any cases in which Mr. Boylan might be a good juror without being

an inhabitant, or possessing the other qualifications negatived by the plea, on the authority of *Rex v. Sheridan*, we must succeed upon this demurrer. The proposition of the Attorney-General, that it is enough if a grand juror be a good and lawful subject, has not been answered. It has been urged, that it would be a very monstrous thing if a sheriff had power to put a crew of Canadian sailors on a grand jury; but if the principle contended for here, on the part of the prisoner, be correct, see what a failure of justice might ensue; how impossible might it not be for a sheriff to guard against improper persons being placed on the jury. There might be a gentleman transacting business as a merchant in the house of his father, in his bailiwick, who would come forward and take the grand juror's oath, and afterwards inform the prisoner of his disqualification. There is a distinction to be observed between grand and petty jurors; the *dicta* cited from Coke apply to petty jurors, and therefore are not in point: (2 Gabbett's Cr. L. 251.) There is no statute now in force imposing any qualification on a grand juror beyond being a good and lawful man: (2 Coke's Inst. 448.) In the provisions of the statute of Henry, there is an express saving of the rights of corporate towns which are not affected by them. The statute 2 Hen. 5, c. 2. s. 3, rendering a freehold qualification necessary, even if in force, only applied to capital cases, and therefore could not affect the present. How many of the cases or *dicta* which have been cited from Bacon were summed up subsequent to that statute? The 23 Hen. 8, c. 13, has been referred to in support of the arguments of the prisoner's counsel. The law which made it necessary to have freeholders on juries in capital cases having been found inconvenient, an act was passed giving the power of sitting on juries not merely to freeholders, but to any one who was a citizen or a freeman, or by any other means enjoyed the privileges, &c. of any city, &c., where he dwelleth and maketh his abode, being worth in moveable goods and substance to the clear value of 40*l*. Thus, even in cases where power of life and death was given to a juror, the possession of leasehold property was not considered necessary; can it, then, be said that such persons would not be, independently of that statute, competent to try a case of misdemeanor? The statute of Hen. 8, as far as it has any bearing on this case, would go to show it was not necessary, before the statute, for a person trying a case not capital to have the qualification. The provisions of 26 Geo. 3, c. 14, relative to the qualifications of grand jurors in certain cases, do not affect grand jurors here. The 3 & 4 Will. 4, c. 33, distinctly and clearly points out that certain grand jurors must have certain qualifications. If, then, the Legislature thought proper to have made a provision to prevent persons disqualified from sitting on grand juries in certain cases, the court are not to declare them as intending any other thing, and we are warranted in inferring that where the Legislature required this qualification in the particular case, they would, if they had thought fit, have introduced it in such cases as the present also. The prisoner here might have pleaded that Mr. Boylan was not a good and lawful man of the

REG.  
v.  
CHARLES  
GAVAN DUFFY.

Pleading—  
Grand jury.

O'Brien in reply.

REG.  
v.  
CHARLES  
GAVAN DUFFY.

Pleading—  
Grand jury.

county of the city of Dublin, which he has not done; but we are told that the averment of Mr. Boylan not being an inhabitant or resident, excludes the case of a person carrying on the trade of a merchant in a house belonging to his father; the son spending most of his time in it. I submit that though not living in Dublin, or possessed of any rateable premises there, still his carrying on the business of a merchant *in the city* is sufficient. He might be a director of one of the banks, he might have large quantities of merchandise in the Custom-house stores: (*Rex v. Adlard*, 4 B. & C. 772.) If a man transacts his business in the city of Dublin, and makes his money there, is he not "*of the city of Dublin*?" There may be many men of wealth and property, and fit to be grand jurors, so circumstanced that they have no chattels real in the city, and then would the court say that though a merchant, because he does not sleep in the city though he spends half his time and makes, perhaps, a fortune there, is not a good and lawful man of the county of the city of Dublin? But the defendant's plea is otherwise bad, it does not negative occupation, nor the possession of moveable property. It has been asked, is a man who has, perhaps, but a pound in his pocket, and the clothes on his back, qualified to be a grand juror? But it would be no more ridiculous than the case of a man who had only a single foot of ground in the city, which, it is admitted, would be a sufficient freehold qualification (2 Chitty Cr. L. 434, referring to Hawk. P. C.) There is this mistake in Chitty, that in the passage in Hawkins referred to, the word "*inhabitant*" is not to be found. Taking the case at common law and independent of the statutes, I have found no case to show that the qualifications contended for at the other side are necessary. It is enough that he should be a good and lawful man of the county of the city of Dublin, and I think that I have shown that, consistently with this plea, he may be a good and lawful man of the county of the city of Dublin; and, therefore, I submit that the court will not hold that such a person is not a good and lawful man of the county of the city of Dublin, and therefore that the crown is entitled to judgment on this demurrer.

December 22.

Judgment of  
Perrin, J.

PERRIN, J.—In this case of *The Queen v. Duffy*, a plea in abatement has been put in to the indictment, which states that two of the jurors by whom the bill was found, Mr. Sweetman and Mr. Boylan, were not inhabitants of the county of the city of Dublin, or resided in it, or freemen, or seised of any estate. I shall observe principally on that which goes to the qualification or disqualification of Mr. Boylan, because it is the more full and perfect of the two. It states that "he was not, at the time of his being sworn on the grand inquest aforesaid, nor at the time of his finding the said supposed indictment and the bill as aforesaid, an inhabitant of the county of the city of Dublin, or resident within the same, or a freeman of the city of Dublin, or a burgess of the

said city, or seised or possessed of any lands, tenements, or hereditaments within the said county of the city, in respect of which he, the said Patrick Boylan, was liable to be rated to the relief of the poor, or for county, parish, and municipal taxes." This objection seems to me to be taken from the Jury Act. To this plea the Attorney-General has demurred, and he insists that it presents no valid objection to the indictment, and that it does not show that the juror is not a good, honest, and lawful man of the county of the city of Dublin. The question for us is, does it show whether the juror is disqualified or not? The argument of this case has been conducted with marked ability by the counsel engaged in it, particularly by Mr. O'Hagan, the junior counsel for the prisoner. With respect to the validity of the plea where a person has objected by a plea in abatement to the qualifications of a grand juror, he cannot be taken to admit the existence of all others which he has not by his plea denied. A great many authorities have been cited which seem to me to show more what the law was, than what it is, and that the law seems to have been altered and consolidated by an act of the 3 & 4 of Will. 4, c. 91. Though we have thought it right and due to the learned counsel who have cited them, to read and examine them, I shall not discuss them. I proceed to discuss the objections assigned; the first is, that he was not an inhabitant of, or resident in, the city of Dublin, or possessed of, or entitled to, rateable property within it. Although it may be true that he is not an inhabitant of, nor resident in, nor possessed of such property, yet he is impanelled by the name of Patrick Boylan of the city of Dublin, merchant, and he may be, notwithstanding that he is not an inhabitant of the city, an extensive merchant or manufacturer in it; he may be commorant there, and conversant there, and following his business for hours every day, either in the shop of a partner or parent, or other person, as manager or conductor. A case has been observed on by counsel on both sides: *R. v. Adlard* (4 B. & C. 772), which shows that a man, without being a resident, might be of a certain place—[Here his lordship read the facts of the case referred to],—the defendant carried on his trade at the house of a partner, and was in the habit of resorting there on working days, and sometimes remained all night, but did not sleep there, and it was held that he was, within the meaning of the act in question, neither an inhabitant or a resident, so as to be subject to poor-rates. In the same book, at p. 951, in the case of *The King v. The Inhabitants of North Curry*, it was held, in the same way, without going through the judgment of Mr. Justice Bailey, and the same observations are repeated by Mr. Justice Holroyd, that though a person may be conversant in and commorant at a place in a city, yet he might not be an inhabitant or resident. It appears to me that these cases show that the term "inhabitant" does not necessarily embrace a person such as I have described, carrying on business in the city, at the Exchange for instance. The next objection is, that he was not possessed of any property subject to be rated. It is confined to that. It does not deny that he is a merchant, or is a merchant having property to any amount, and

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
Pleading—  
Grand jury.

Judgment of  
Perrin, J.



REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
Pleading—  
Grand jury.

Judgment of  
Perrin J.

consistently with anything in this plea, Mr. Boylan may be a merchant possessed of property of great value, though he could not be rated in respect of it. The next objection is, that he is not a freeman or burgess of the city. Now with respect to that objection, the plea does not deny that Mr. Boylan is, in the words of the precept, a good, honest and lawful man of the county of the city of Dublin. It does not deny that he is a freeman, but that he is a freeman of the city of Dublin; that is, that he is not a freeman by tenure or charter, but under the improved constitution of the country all men are free, except outlaws or convicts; villeinage and vassalage are done away with, and all subjects now are free, not by tenure from any one, or charter from the crown, but by the law of the land, and the right growing out of it, and therefore, as I before mentioned, this plea does not deny that Mr. Boylan is a free, good, honest and lawful man of the county of the city of Dublin, because a man may be a good, honest and lawful man of the city of Dublin, though he do not reside in it. If a man resides in one place, and transacts his business in another, he is a man of one place or the other: (Com. Dig. tit. Abatement, F. 25; Felwyl's Digest, and Barnes, 162.) Canadians, to meet a case cited in argument, I do not think could fairly be described as merchants of the city of Dublin; I do not think that extreme case fairly put; nor does it establish that Mr. Boylan is not, though not resident, a good, honest, and lawful man of the county of the city. He may be the eldest son of a resident merchant of considerable property—he may conduct his business. With respect to the form of the plea, I did not intend to notice it, I prefer to rule the case on the substance, but I think the form of it is borne out by the precedent in *Kirwan's case*, as to the putting several matters in it. It is plain from *Kirwan's case*, that it is sufficient: a man may not have a rood of ground in the city of Dublin, and may not be liable to rates and taxes, and yet be a good and lawful man of the city—he may have property to great amount—he may have goods in the custom-house stores, which are not liable to rates or taxes—he may transact business on the Exchange—he may be a director of a bank—he may draw the amount of his profits every quarter,—further, he may be on the special jurors' book, or also, as appears from the 24th section of 3 & 4 Will. 4, c. 91, he may be the eldest son of such persons, and he may be placed on the jurors' list though he is subject to all these objections. What authority is there against his serving? I need not observe on the importance of the case reported in Russell and Ryan, and followed both in England and Ireland, deciding that a freehold is not a necessary qualification for a grand juror, and not followed by any act of Parliament altering that decision, though this plea seems to be taken from the statute: (3 & 4 Will. 4, c. 91). It was not precisely argued upon that statute; it seemed to be wished that it should be taken that the statute did not apply. It is not very clear, but I think that the act throws some light on the subject. I do not hold the decision in *Re Nowlan* (2 Jebb & S. 1), to be a

decision on the point, nor was it necessary to decide it. Though the matter is not very clear, yet, when we look at the title of the act made to consolidate and amend the law relating to jurors, it would be difficult to hold that the Legislature did not mean to make some provision relative to grand jurors. The act provides that the sheriff shall not in any *venire facias* or precept, which is the process by which grand jurors are summoned, return the name of any person not qualified to serve on juries by this act, and it then provides (in 1st section), that "every resident, merchant, freeman and householder, having a house and tenements in any city, town or borough situate within the said county, of the clear yearly value of twenty pounds, such city, town or borough not being a county in itself," shall be qualified with respect to property, and shall be liable to serve on grand juries at Quarter Sessions. It is said that that act is not conversant with grand juries, but it is difficult to comprehend that; there are frequent references to trials of issues, and that of course alludes to petty juries, but there is that reference to grand juries at sessions of the peace; and in section 10 it is enacted, that every precept to be issued for the return of jurors before courts of Oyer and Terminer, Gaol Delivery and Sessions of the Peace in Ireland, shall in like manner direct the sheriff to return a competent number of good and lawful men of the body of his county, qualified according to law, and shall not require the same to be returned from any particular venue within the county. It would seem to me that that section plainly applied to persons returned upon a precept for summoning a grand jury. [His lordship here read the form of the precept now used, leaving out what the former precepts required, that the grand jurors should have a qualification of freehold.] I have looked through precepts both before and after the 3 & 4 Will. 4, and I find that to be the case. The 11th section provides, that the sheriff shall not return any names on the jurors' book, and thence it would seem the fair inference to draw, that those who are on the jurors' book are fit persons to be returned. The 20th section provides, that if any one is placed on the jurors' book as qualified, want of freehold shall not be a cause of challenge. Sections 24 and 33 appear to me to be very important, and particularly in considering the case of a man having a residence outside the city, and coming in to carry on his business, or of the eldest son of such a person. It enacts, that the sheriff shall take from the jurors' book the names of all such persons only, sons of peers, and of all baronets, knights, magistrates, and of persons who have served, or been returned to serve, the office of sheriff or grand juror at the assizes, and of all bankers and wholesale merchants who do not exercise retail trades, and of all traders who are possessed of personal property of the value of five thousand pounds, and of the eldest sons of such persons respectively, thus comprehending the principal inhabitants of the city, whether it be a county at large or a city; he is to take the eldest sons of those persons, and put them on this list: for what purpose? to have

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
Pleading—  
Grand jury.

Judgment of  
Perrin, J.

REG.  
v.  
CHARLES  
GAVAN DUFFY.

Pleading—  
Grand jury.

a list from which the grand jury is to be formed, or a special jury, when it is required; and we cannot forget that it was the ordinary course that the sheriff was ordered in such cases, to return the grand panel as it was called. Then the 3rd section enacts, that every sheriff shall be indemnified for impanelling “and returning any man named in the jurors’ book, although he may not be qualified or liable to serve on juries, and that if any sheriff or other such minister shall wilfully impanel and return any man to serve on any jury before any of the courts hereinbefore mentioned (except on the grand jury at any assizes or sessions), such man’s name not being inserted in the jurors’ book for the current year,” the court shall, “upon examination, set such fine upon such sheriff, minister, prothonotary, judge’s clerk, clerk of the peace, or other officer offending, as the court shall think meet,” so that it enables him to call on grand juries, either at an assizes in the county, or at any sessions, (where the Legislature applies the word session to sessions of the peace, it is so expressed: so the meaning of the section here is, at any assizes or commission of Oyer and Terminer, General Gaol Delivery), persons not on the jurors’ book. But by the 24th section, the eldest sons of merchants, and wholesale traders, possessed of 5,000*l.*, are to be put on the jurors’ book, not as having any qualification of their own, but as the eldest sons of those persons, and my opinion is, that the act does refer to grand juries, and that it does require the sheriff to place on the jurors’ list the eldest sons of those persons to whom I have referred, and that therefore the plea is insufficient, as not negativing that qualification, and that the just inference from the whole of this act is, that any person who is so qualified and liable to serve as a special juror, is liable and is qualified to serve as a grand juror. It is every day’s experience, that sons of noblemen, and persons who have no property themselves, are placed on grand juries. This qualification not being denied, it must be taken to be admitted (according to the judgment of Lord Downes, in the case of *The King v. Sheridan (or Kirwan)*), and that neither Mr. Boylan nor Mr. Sweetman are, upon this plea, to be taken to be disqualified.

Judgment of  
Richards, B.

RICHARDS, B.—I shall have very little to add to what has fallen from my brother Perrin. With respect to what has fallen from him, as to the objection made to the form of the plea, I content myself with stating that I concur in it; and with respect to the substance of these pleas, I also concur in the judgment which has been pronounced. After as careful an examination of all the cases and authorities as the time would admit, I cannot find any case to show that, except where it has been made necessary by statute, a grand juror should have any qualification in point of property; he should be *liber homo*, he should be a freeman as contradistinguished from a villein; he should be *probus*, and taken from the body of the county where he is called. In 2 Hale, 155, it is laid down that at common law it is necessary that a grand juror should have a freehold, and the same doctrine is laid down elsewhere, and seems to have been admitted by the learned counsel, who argued

Kirwan's case for the crown; but it is nowhere laid down what the amount is, I am now speaking of the matter at common law. If I might venture to account for the notion that a grand juror should be a freeholder, while the value of his freehold does not appear to have been in any degree material, I would say that such an opinion prevailed merely because in early times the distinguishing characteristic between *liber homo* and a *villein* was the having a Frank tenement, a villein could not be a juror, but a man having a Frank tenement could not be a *villein*, and therefore the question to be inquired into only, was, whether he was a freeholder or not, and not what was the amount of his tenement, and that throws some light upon the statutes (13 Edw. 1, c. 38; 21 Edw. 1, c. 1.) The 21 Edw. 1, which I need not particularly state, raises the qualification (required by 13 Edw. 1, c. 38.) These statutes, I admit, require some amount of qualification. 21 Edw. 1, was not intended in any way to affect the mode of summoning jurors in counties of cities or towns, many of which had charters of incorporation long before the earliest of these statutes, and were invested with all privileges, but the practice resorted to in counties to ascertain whether a man was *liber homo* could not be applied in a city, but there were, as the necessity of the case required, other tests adopted, and I find nothing to show that at common law a juror in a city should have any property qualification; there is nothing on the subject that I am aware of, until we come to the statute 2 Hen. 4, c. 3, the form of which being general was held to extend to cities. The act was found so hard to work in cities and towns, that the Legislature of England in the 23 Hen. 8, repealed it, but the 2 Hen. 5 having become law in Ireland, by Poyning's Law (10 H. 7, c. 2), while the act of Hen. 8, not being passed till after Poyning's Act, the 2 Hen. 5 remained law in Ireland until the passing of the 3 & 4 Will. 4, c. 91; but the statute of Hen. 5, even if in force in Ireland, could not apply to the present case—so far as it applied to the criminal law, it applied only to capital cases, and therefore could not affect the present. I think I shall save much time by now coming to the case of *The King v. Sheridan*, in which it was decided that a grand juror need not have a freehold. In that case it was decided (except in cases within the statute, the 2 Hen. 5 not being then repealed), that freemen in cities must be considered the same as freeholders in a county at large. But I apprehend that it cannot now be argued that a man may not be *liber*, and good and lawful, without being a freeman, and if the case be so, I should like to know what man being *probus et liber*, or *probus aut liber*, is disqualified from being a grand juror in a county of a city at a Commission of Oyer and Terminer and General Gaol Delivery: I find no law, nor any case laying down or describing the qualifications of grand jurors in counties of cities beyond what I have stated. The act of Will. 4 has prescribed that persons qualified in the manner therein mentioned shall be liable to serve on grand juries at the court of sessions of the peace; that provision manifestly meant only to apply to courts of inferior

REG.  
F.  
CHARLES  
GAVAN DUFFY.  
—  
Pleading—  
Grand jury.

REG.  
v.  
CHARLES  
GAVAN DUFFY.

Pleading—  
Grand jury.

jurisdiction; and to show that it was not intended that the act should extend to grand juries at assizes, or Commissions of Oyer and Terminer, I would refer to the 33rd section, which contains an express exception to that effect. The section provides, that a fine shall be set upon any sheriff who shall return any man to serve on any jury before any of the courts before mentioned whose name has not been inserted in the jurors' book, "except on the grand jury at an assizes or sessions." Now that section appears to me to be exceedingly important when the purview of the act is considered that all jurors are to be put on the jurors' book, yet here is a section allowing the sheriff to go out of the jurors' book altogether; possibly, it was thought unnecessary to pass any law prescribing the qualifications of grand jurors at assizes and Commissions of Oyer and Terminer, regard being had to the class of persons who usually are called on to serve as grand jurors in Superior Courts, and therefore I would say that the words *liber homo* are to be taken as distinguished from villein, and that as there is now no such thing as a *villein*, every liege subject of Her Majesty is *liber homo*, and not being otherwise disqualified, is liable to serve on grand juries. But it is said that a juror cannot legally act as such, unless he be of the body of the county, and that Mr. Boylan cannot, consistently with this plea, be considered as of the body of the county. But I take it he may consistently, with anything in this plea, be a merchant in this city; he may have a partner there, and though he may have a residence outside the city, he may spend his time in it, at the exchange, or at the banks; he may be a director of some of the banks, and have a share in the concern; he may balance his books every month, and take his share of the profits away. I should say he may be in such case described to be Patrick Boylan, of the city of Dublin, merchant; though he is not an inhabitant or freeman, or possessed of any ratable property in it: he is described on the panel as Patrick Boylan, of the city of Dublin, merchant, and that, if true, entitles him to be a juror, and, in my opinion, in this plea, it has not been denied either in form or substance that he is so. An extreme case has been put, but when such cases come before the court, when a crew of Canadian sailors come, and are described as merchants of the city of Dublin, the court will know how to deal with it. My brother has referred to the case of *R. v. Adlard*, and *Rex v. The Inhabitants of North Curry*, which, therefore, I need not advert to. On the whole, I very fully concur with the judgment which has been pronounced.

*Judgment of respondeat ouster.*

[The prisoner having been called on by the Clerk of the Crown to plead, his counsel tendered a demurrer to the indictment. The Attorney-General immediately joined in demurrer, but the argument of it was postponed to a future day.]

## CROWN CASE RESERVED.

*April 27, 1850.*

(Before LORD CAMPBELL, C. J., PARKE, B., ALDERSON, B.,  
CRESSWELL, J., and ERLE, J.)

REG. v. JAMES THOMPSON. (a)

*Larceny—Joint taking of husband's goods by wife and adulterer.*

*If a wife leaves her husband for the purpose of an adulterous intercourse with another man, and there is a joint taking by them of the husband's goods, the man may be convicted of larceny.*

THE following case was reserved by the chairman of the Lancashire Sessions:—

James Thompson was indicted at the Quarter Sessions for the <sup>Case.</sup> county of Lancaster, held by adjournment, at Salford, on the 17th day of January, 1850, and was found guilty of stealing nine gowns, two brass candlesticks, one coffee-pot, one dining-table, two aprons, two pair of boots, two pair of shoes, four shawls, two pair of stockings, two sheets, and two silk handkerchiefs, the property of Thomas Edgerton. The evidence showed that the prisoner, who worked and lodged at the prosecutor's house, went away on the 4th of January, 1848, with the prosecutor's wife. That they went to Birmingham, where they lived together as man and wife for more than a year. That they took with them from the prosecutor's house a box belonging to the prisoner containing the wife's wearing apparel, and also a coffee-pot, and two candlesticks, the property of the prosecutor. The wife of the prosecutor was examined, and gave very contradictory evidence as to what passed at the time of leaving the prosecutor's house. She stated, however, as part of her evidence, that the prisoner assisted in placing things in the box, and in removing the box from the cellar to the cart in which it was taken away. It appeared further, that on the parties arriving at Birmingham, the box was opened, and the prisoner saw its contents. That the coffee-pots and candlesticks were used by them in their house at Birmingham, and that these articles were afterwards sold by the prosecutor's wife. That the prisoner there pledged some articles of the wearing apparel, and applied the money for his own purposes. The chairman, in summing up, directed the jury to find the prisoner guilty if they came

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

*Reg.  
v.  
Turner.  
Lawry.*

to the one or the other of the following conclusions:—Either that the prisoner, going away with the prosecutor's wife for the purpose of an adulterous intercourse, was engaged jointly with her in taking the goods; or, secondly, that not being a party to the original taking or removal, the prisoner, after arriving at Birmingham, appropriated any part of the goods to his own use. The jury found the prisoner guilty, adding that they did so on the ground that there was a joint taking by the prisoner and the prosecutor's wife. The counsel for the prisoner applied to the court to reserve the question, and the cases of *Reg. v. Clark* (1 Russ. & Ry. 376, note (a),) and *Reg. v. Rosenberg* (1 Car. & Kir. 238), were cited. The Court of Quarter Sessions acceded to the application, and submit for the opinion of the justices of either bench, and barons of the Exchequer, the question whether the case was properly left to the jury, and the conviction good.

No counsel were instructed to argue the case.

*Judgment.*

LORD CAMPBELL, C. J.—It being found that there was a joint taking in this case, it is quite clear that the conviction was right. (a)

*Conviction affirmed.*

(a) *R. v. Tolfree* (1 Moo. C. C. 243); *R. v. Tollett* (Car. & M. 112.) Whether the second part of the chairman's direction to the jury was correct is doubtful. In *Reg. v. Rosenberg* (1 Cox's Crim. Cas. 31), the following passage from Dalton's Justice (c. 157, par. 17, p. 504, ed. 1727), was cited: "If a married woman shall deliver to her adulterer her husband's goods, this is felony in the adulterer:" but Parke, B. said, that if that question arose, he should reserve it for the judges.

## CROWN CASE RESERVED.

*April 27, 1850.*(Before LORD CAMPBELL, C. J., PARKE, B., ALDERSON, B.,  
CRESSWELL, J., and ERLE, J.)

REG. v. WOOLLEY. (a)

*False pretences—What are, within the statute.*

*Any false statement of an alleged existing fact fraudulently made for the purpose of obtaining money, and by which money is obtained, is a false pretence within the stat. 7 & 8 Geo. 4, c. 29, s. 53, although the prosecutor might, by the exercise of reasonable caution, have detected the imposition. The question is for the jury, whether, in truth, the false statement did impose upon the prosecutor, and induce him to part with his money.*

*Therefore, the secretary of a society of Odd Fellows, who had falsely pretended to one of the members that he owed to the society more than in truth he did owe, and obtained money thereby, was held properly convicted under that statute.*

THE following cases were reserved by Patteson, J., at the last Stafford Assizes:—

First Case.—The prisoner was tried and convicted before me at the last assizes at Stafford, on an indictment which charged in the first count, that he was secretary to the Earl of Uxbridge Lodge of Oddfellows at Burton-upon-Trent. That Joseph Buxton was a member, and indebted thereto in 2s. 2d. That defendant falsely pretended to Buxton that 13s. 9d. was due from him to the lodge, and thereby obtained from him 1 sovereign, 1 half sovereign, 3 crowns, 4 half-crowns, 11 shillings, 23 sixpences, 139 pence, and 278 halfpence, of the moneys of Buxton, with intent to cheat and defraud him, whereas, &c. First case.

Second Count alleged the obtaining of same moneys, omitting the sovereign and half sovereign.

Third Count.—Falsely pretending to Joseph Buxton that 13s. 9d. would be due and owing on 28th November from him to a certain society called the Earl of Uxbridge Lodge of Odd Fellows, and obtaining 13s. 9d.

Fourth Count.—Obtaining 13s. 6d.

Fifth Count.—Unlawfully demanding, having and receiving 13s. 9d.

It appeared in evidence that Joseph Buxton was a member of the lodge; that his contribution was 9d. per fortnight; that the prisoner was permanent secretary of the lodge, with a salary.

(a) Reported by A. BITTLESTON, Esq. Barrister-at-Law.



REG. That it was his duty to receive money from the members in lodge  
v. hours; but he had no authority to receive any out of the lodge;  
WOOLLEY. that on the 17th November prisoner himself brought and tendered  
False pretences. to Buxton out of the lodge a writing or summons in the words  
following:—

Earl of Uxbridge Lodge, Burton-on-Trent,  
November 14, 1848.

Sir, and Br. (Brother).—I hereby give you notice that you owe  
to your lodge for contributions, &c., the sum of 13s. 9d., due on  
the 20th November. Yours, respectfully,  
To Mr. Joseph Buxton. WILLIAM WOOLLEY.

The 20th November was the next lodge night after the 14th. Prisoner said, I have brought you a summons for the money you owe the lodge. Buxton opened the paper, and said, do I owe that amount, 13s. 9d.? Prisoner said, you do. Buxton said, it is not very long since I paid a sum at the lodge to you. Prisoner said, that is what you owe. Buxton said, very well; and paid him 14s., and received 3d. in change; but Buxton could not recollect in what coin he had paid, except that there were half-crowns. Buxton had never paid money out of the lodge before; he never paid any more, nor went to the lodge afterwards. Prisoner wrote on the paper, "November 17th, 1848. Received 13s. 9d. on this account William Woolley."

Case.

It appeared by the books of the lodge in prisoner's writing, that Buxton had paid 3s. 9d. on the 23rd of October at the lodge, and that on November 20th two sums of 9d., and a subscription of 8d. were due from him. The prisoner accounted to the treasurer on the 20th November, and paid him 4l. 11s. 1d., but no sum of 13s. 9d. from Buxton. There was no entry on 20th of November of any fine inflicted on Buxton; but there was an entry in prisoner's writing of a fine of 1s. on him, on the 4th December. Fines are entered at the time they are inflicted. On 22nd October, 1849, there is an entry against Buxton's name, 21s. 10d.—"expelled."

Vaughan, for the prisoner, objected, first, that there was no false pretence within the stat. 7 & 8 Geo. 4, c. 29, s. 53; that the fact of what was due was as much within the knowledge of Buxton as of the prisoner; that it was no more a false pretence than if a creditor should say, you owe me 5l., when the debt was only 2l., and so obtain 5l.: (see 2 East P. C. 830, *R. v. Withell*; 2 Moo. C. C. 254, *R. v. Johnston*; Car. & Mar. 249, *R. v. Ball*; 7 C. & P. 848, *R. v. Reed*.)

Secondly. That if there be any false pretence, it is the paper or summons, which, therefore, ought to be set forth in the indictment: (see Starkie on Crim. Pleading, 97.)

On the other side, it was contended, that the false pretence was the oral assertion of the prisoner, who himself brought the paper signed by himself, that the money was due: (16 L. J. 9, *Mag. Cas.*)

*Hamilton v. The Queen* (in error).) I request the opinion of the court, whether this conviction can be sustained upon all or any of the counts of the indictment.

REG.  
v.  
WOOLLEY.

Second Case.—The same prisoner was also convicted on an indictment, charging him with obtaining a sovereign from William Buxton, by false pretences, with intent to defraud him. The indictment was in a similar form to the preceding one. William Buxton was a member of the lodge, and contributed 9d. per fortnight. He had been residing at Manchester, and paid, through his mother, who resided at Burton-on-Trent. It appeared by the prisoner's books, that payment of 1s. 6d. was made on account of William Buxton, on the 23rd of April, 1849, so that 3s. would be due on 18th June, and there is an entry by the prisoner of payment, by Buxton, of 3s. on the 18th June. On the 15th June, Buxton returned to Burton, and on the 18th went to the lodge, being a lodge night, when he was outside the door, he saw the prisoner inside, who told him he could not be admitted till he was clear. Buxton asked what was due. The prisoner said 13s. 5d. Buxton gave him a sovereign, and was then admitted. The prisoner went to his desk, and entered 13s. 5d. on Buxton's card; but he paid over to the treasurer 5s. only, as received from Buxton, which was the sum really due. The same objections were made in this case, so far as they were applicable.

False pretences.

Second case.

*Vaughan*, for the prisoner.—This is not a false pretence within stat. 7 & 8 Geo. 4, c. 29, s. 53. All the cases under that statute belong to one of three classes. First, where the prisoner has made a false representation as to his own character, station, or circumstances; secondly, where he has falsely pretended that some event has happened; and, thirdly, where he has obtained credit by representing that he had an authority from some third person, which, in truth, he had not. In the first class are *R. v. Barnard* (7 Car. & P. 784), where the defendant falsely represented himself to be a member of the university of Oxford, by wearing a commoner's cap and gown; *R. v. Wickham* (10 Ad. & Ell. 34), where part of the false pretence was, that the defendant was a captain in the East India Company's service; and *Hamilton v. The Queen* (9 Q. B. Rep. 271; 2 Cox's Crim. Cas. 11), where the defendant pretended that he was a captain in the Fifth Dragoon Guards. To the second class belongs the case of *R. v. Young* (3 T. R. 98), where the false pretence was, that the defendants had made a bet with another person that one of them should run ten miles within an hour; and in the third class are *R. v. Freeth* (Russ. & Ry. 127), where the defendant obtained goods and money for a forged note of hand; *R. v. Coleman* (1 Leach, 303 a; 2 East P. C. 672), where a carrier falsely pretended to the consignor that he had carried certain goods to the consignee; and *R. v. Douglas* (1 Camp. 212), where a porter represented that a false portage ticket was a true one, and that more had been charged for the portage of a parcel than had in truth been charged. It will be observed, therefore, that all these representations were such, that

Argument  
for prisoner.

REG.  
v.  
WOOLLEY.

False pretences.

the truth or falsehood of them neither was known, nor could at the time be ascertained by the party to whom they were made.

LORD CAMPBELL, C. J.—Then do you define a false pretence within the statute to be a false statement of any fact, the truth or falsehood of which cannot be ascertained by the party to whom it is made? The statute adds no such qualification.

*Vaughan.*—If the prosecutor has the means of knowledge at the time when the statement is made, the offence is not committed.

ALDERSON, B.—If the prosecutor knew the statement to be false, then the jury would not find that the money or goods had been obtained by means of the false pretence.

*Vaughan.*—Some limitation has been and must be put upon the very general words of the statute; for they would include a false representation as to a future event: (see *R. v. Goodhall*, R. & R. 461.) What is the reason for excluding that case? As the pretence regards a future event, there is time and opportunity for inquiry.

ERLE, J.—The statement of a future possible event can hardly be essentially false.

ALDERSON, B.—The possibility of inquiry always exists.

*Vaughan.*—Here the member of the society had the same means of knowing what was due as the secretary.

Argument  
for prisoner.

PARKE, B.—There is a very good note (a) on this subject by Mr. Greaves in his edition of Russ. on Crimes (vol. 2, 289.) It seems very correct to say that any false pretence of an existing fact, intended to impose and actually imposing upon the party, to whom it is made, is within the statute; and if so, this case is within it.

*Vaughan.*—*R. v. Wheatley* (2 Burr. 1129), seems to point out that the mischief, against which the statute is directed, was the making of false statements against which common prudence could not guard.

ERLE, J.—The law is for the protection of the weak more than the strong. (He referred to *R. v. Kenrick*, 5 Q. B. 49.)

PARKE, B.—In *R. v. Wickham* (10 Ad. & Ell. 34, 37), Lord Denman said, very properly, “suppose a man has just wit enough to impose upon a very simple person and defraud him; how is it to be determined whether the degree of fraud is such as shall

(a) The following is the note referred to:—

“It is submitted that the jury are the proper persons to give the measure, and that it is for them to say whether or not the pretences used were the means of obtaining the property. Any rule founded upon the pretence being such as would impose upon persons of ordinary caution, would leave all who were unfortunately gifted with a less degree of caution at the mercy of the fraudulent and designing. And as in robbery it would be absurd to lay down any rule which defined the force necessary to constitute a robbery with reference to the ordinary strength of mankind, so, in false pretences, it would be equally absurd to establish a rule with reference to the ordinary capacity of mankind. On the other hand, as in robbery, the correct rule clearly is, that any force sufficient to overcome the bodily resistance of the party robbed constitutes the offence, whether that party be a powerful man or a feeble woman; so it is submitted that any pretence sufficient to overcome and impose upon the mind of the party to whom it is made, ought to be considered to constitute an offence within this statute; and that whether it were of such a character or not ought to be left to the determination of the jury with reference to all the facts of the particular case.”

amount to a misdemeanor? Who is to give the measure?" And again he asked "Why is it the prosecutor's folly more than the defendant's fraud?" It is clear that the jury must say whether the party has been imposed upon.

REG.  
v.  
WOOLLEY.  
—  
*False pretences.*

ALDERSON, B.—And they would not say so, if the pretence was so absurd that it could not impose upon any one. The law of false tokens was more strict.

LORD CAMPBELL, C. J.—It must be recollected that the minds of the two persons are in a very different state. The party who made the false pretence that the money was due knew that it was false; the other might be in a state of doubt and uncertainty. If the money was not obtained by the false statement, the defendant would be acquitted; but if the money was thereby obtained, is it not a false pretence within the statute?

ERLE, J.—In *R. v. Douglas*, the imposition would have been detected by any person who knew the proper rate of charge for the carriage of parcels.

*Vaughan*.—Then suppose a tradesman were to say to his customer, "you owe me 5*l.*," knowing at the time that less or nothing was due, and thereby obtained 5*l.*, can it be said that that would be within the statute?

LORD CAMPBELL, C. J.—I believe we all think that it would.

ALDERSON, B.—In *R. v. Williams* (2 East P. C. 830; cited 3 T. R. 104), the defendant falsely pretended that he was intrusted by the Duke de Lauzun to take some horses from Ireland to London, and it was held to be within the act, though the fact might have been ascertained.

*Vaughan*.—In *R. v. Reed* (7 Car. & P. 848), it was held that a false representation that a quantity of coals delivered by the defendant to the prosecutor weighed more than in truth they did weigh, was a mere false affirmation not indictable.

LORD CAMPBELL, C. J.—We are all of opinion that these convictions must be affirmed. The law has been very accurately stated by Lord Denman in the case cited.

*Convictions affirmed.*

## CROWN CASE RESERVED.

April 27, 1850.

(Before LORD CAMPBELL, C. J., PARKE, B., ALDERSON, B.,  
CRESSWELL, J., and ERLE, J.)

REG. v. J. T. SIMPSON JONES. (a)

*False pretences—Charitable gift—Venue—Value of property.*

*To procure a mere voluntary charitable gift by false pretences is an offence within stat. 7 & 8 Geo. 4, c. 29, s. 53.*

*An indictment charged the defendant with obtaining by false pretences, in one count, a post-office order, in another, a 5l. bank-note, and in a third two pieces of paper, to wit, two halves of a 5l. bank-note of the value of 1s. It was proved that the prosecutor, at the request of the prisoner, transmitted through the post a letter containing a post-office order: Held, that the defendant was properly tried in the county in which that letter was posted, though it was received by the prisoner in a different county.*

*It was also proved that he sent through the post two halves of a 5l. bank-note, one of which was received in the county of W., the other in the county of M.:*

*Held, that the half notes were of sufficient value to sustain a conviction upon the count charging the receipt of two pieces of paper.*

THE following case was reserved by the assistant judge of the Middlesex Sessions:—

Case.

John Thomas Simpson Jones was indicted for obtaining by false pretences a post-office order for the payment of 3l. of the goods and chattels of John Collingridge, with intent to cheat and defraud him of the same, and in other counts for obtaining a 5l. bank-note and two pieces of paper, to wit, two halves of a 5l. bank-note of the value of 1s., of the goods, chattels and moneys of the said John Collingridge, with intent to defraud him thereof.

It was proved in evidence that the prosecutor resided at Sunbury in Middlesex, having a house also at Bath, but that at the time of his receiving the letter hereinafter first-mentioned, he was at his house at Sunbury, and the prisoner at Vauxhall-road, in the same county, and with respect to the first charge that the prisoner

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

wrote at his residence the letter, of which the following is a copy, with intent to defraud the prosecutor, and assuming a name to which he had no right, viz., that of Dr. Scott subscribed to the letter:—

REG.  
v.  
J. T. S. JONES.

*False pretences*  
—*Venue*  
—*Evidence.*

Gravesend, July 30th, 1849.

Sir,—Permit me to address you in a case of charity at the earnest entreaty of James Brewer, a young man whom you have been very kind to upon several occasions, and some months ago you gave him 1*l.* 3*s.* to take him to Leamington: he was ordered here for the benefit of sea bathing, but the air being too keen for his delicate frame, he has been advised to endeavour to gain admission to the Consumption Hospital, Brompton, near London. He is in very distressed circumstances, and has no means of paying the fees of that institution, and is also indebted here to his landlady for board, &c. Your kindness to him before induces him to hope that you might once more, and for the last time, render him some little assistance to enable him to make up fifty shillings, all that he is deficient of. I have taken more than usual interest in his case, having given him some linen, and 1*l.* 10*s.* in cash, which is as much as my limited means will admit me to do. The sad intelligence of a death in my family obliges me to leave home in a few hours for Scotland, and I shall be absent some weeks; therefore you will be pleased to return an answer to the poor youth himself, along with the inclosure, which is of importance to him, addressed James Brewer, Post-office, Gravesend, Kent, to be left till called for; and I have instructed Miss Scott, my sister, to acknowledge the receipt for him. Trusting the motive which actuates me in preferring the request will be deemed an apology, Case.

I am, Sir, your obedient Servant,  
JNO. H. SCOTT, M.D.

To John Collingridge, Esq., Bath.

That he delivered the same to an accomplice at his residence in Middlesex, with instructions to put it in the post-office at Gravesend, to be there posted; that the same was posted accordingly, and duly received by the prosecutor in Middlesex, it having been forwarded from Bath, in the county of Somerset, to him at Sunbury. He thereupon believing the story told in the said letter to be true, and that it had been written by a Dr. Scott, obtained a post-office order at Sunbury for the sum of 3*l.*, as laid in the indictment, in favour of James Brewer, and having inclosed the same in a sealed envelope, addressed James Brewer, Post-office, Gravesend, Kent, put it in the Sunbury post-office, where it was transmitted by course of post to Gravesend, in the county of Kent, and there received by the accomplice (under the prisoner's instructions), who got the money for the order, and gave half the proceeds to the prisoner at his residence in Vauxhall-road, keeping the other half himself. The pretences were each and every of them false to the prisoner's knowledge, and the letter was written with intent to cheat and defraud the prosecutor, and obtain money from

REG.  
v.  
J. T. S. JONES.

*False pretences*  
—*Venue*  
—*Evidence.*

him, and the name of Scott was assumed for that purpose. With respect to the second charge, it was proved that the prisoner wrote and posted the following letter from Bath:—

Bath, August 10th, 1849.

Sir,—It is a most unusual thing for me to address an individual to whom I am an entire stranger; but circumstances over which I have had no control, almost compel me to make my present situation known, and having received this morning a note from Dr. Harrison, who was an early friend of my late father, the Rev. B. C. Collingridge, of Newcastle, intimating that a namesake of mine was residing at Bath, and under an impression (as our name is by no means common), I have ventured to address you, thinking you might spring from the Northumberland family of the Collingridges. I know of no relation in the world living bearing my name, except an only brother, now living in Hexham, and several sisters married, who of course do not take the name now. I have been bred to mercantile pursuits, and for many years resided at Cape St. Mary's, River Gambia, Western Coast of Africa, where I lost in one night, by the upsetting of a shallop, a small decked vessel, at the mouth of the River Nemo, the entire savings of many years of industrious but laborious toil, amounting to 2,570*l.*, in one of the most unhealthy climates in the world; and what is worse than the mere loss of health, the burning heat of the Torrid Zone has so injured my constitution, that at the early age of thirty-four I have been compelled to relinquish a good situation which required some activity. Since my return to England I have for some time past been endeavouring to obtain a situation in some of the milder West India Islands, Madeira, or the south of Europe, with a view of re-establishing my health, but all endeavours have proved unavailing. The medical profession have recommended me to try the benefit of the Bath waters, but I am sorry to say I have found no benefit, my funds are almost, nay, I may say, wholly expended, and I have not one single friend whom I may appeal to in confidence. Upon beginning to write this it was my intention to have asked you to advance me a small sum as a loan, that is, if you had any knowledge of our family in the north, but I will refrain from asking that favour, for if you obliged me with a loan I have no prospect in the world of repaying it at present, and if it is in your power to assist a ruined merchant in ill health I will feel truly grateful; it must be as a gift, for, from the terms of my brother's letter, it appears his means are limited, and I have no prospect there, except casual assistance. Read his letter and you will see his position and mine; he sent me 5*l.* in June, having an aged mother to maintain, and a large family upon his small practice, being by profession a surgeon. I really cannot summon resolution to apply to him, at least, for a time. The enclosed letter you will be pleased to return to me, as also the note, which you will perceive is signed by the Archbishop of York (signed Ebor, I presume the latin name for that

Case.

city,) and as I am invited to spend a day with a family in Chippenham some twelve miles distant, you will be pleased to return to me there, addressed as below. I am a poor one, Mr. Collingridge, to press for a favour; I have always, through life, been placed above it, but my distresses are not the less; the privations which I have undergone and am now silently undergoing, are not the less keen because I do not enlarge upon them, but as I have addressed you in confidence, I will here state, if you can render me any pecuniary assistance, without injury to those who may have strong claims upon you and equally necessitous, I will be for ever grateful for the least aid. An early answer will oblige. And I may here mention it was your domestic in Pulteney-street who gave me your address, having called this morning in the hope of seeing you personally. Wishing you, Sir, a large enjoyment of peace and tranquillity,

I remain, Sir, your obedient servant,  
JOHN HENRY COLLINGRIDGE.

Address Mr. J. H. Collingridge (to be called for), late from Africa, the Post Office, Chippenham, Wilts.

J. H. C.

To John Collingridge, Esq. (of Bath),  
Sunbury Villa, Sunbury, Middlesex.

That it was duly received at Sunbury by the prosecutor, who thereupon believing its contents to be true, and that it was written by a person bearing the name of John Henry Collingridge, enclosed one half of a 5*l.* note in a letter, addressed "Mr. J. H. Collingridge (to be called for), late from Africa, Post Office, Chippenham, Wilts," and forwarded it by post from Sunbury to Chippenham, in the county of Wilts, where it was received by the prisoner, who thereupon requested the prosecutor by letter to forward the second half of the note by post to his residence in Middlesex, and which the prosecutor, who was then still at Sunbury, did, and wrote from thence accordingly, and the prisoner received it there, and by letter duly acknowledged the receipt of such half note there. The letter was written by the prisoner himself, with intent to defraud the prosecutor of his money. He knew the contents to be false, assuming, for the purpose of such fraud, the name of John Henry Collingridge, to which he was not and never had been entitled. Case.

Three points were taken by the prisoner's counsel as to both charges.

1st. That neither of them were offences within the meaning of the statute. The post-office order and the 5*l.* were mere voluntary gifts, and that the statute did not apply to voluntary charitable gifts.

2nd. As to the first charge, that the same, if triable anywhere, was only triable in the county in which the post-office order was received. And that it was received in the county of Kent.

REG.  
F.  
J. T. S. JONES.  
—  
*False pretences*  
— *Venue*  
— *Evidence.*



REG.  
v.  
J. T. S. JONES.

False pretences  
—Venue  
—Evidence.

3rd. As to the second charge, that one half of the bank-note having been received in Wiltshire, and the other half in Middlesex the bank-note was not received in Middlesex; and that with respect to the charge of obtaining two pieces of paper, to wit, two halves of a Bank of England note, value one shilling, the same constituted no offence, because the halves were of themselves and as distinct from each other valueless. The jury found the prisoner guilty.

No counsel was instructed on behalf of the prisoner.

Argument for  
the prosecution.

*Phinn*, for the prosecution.—The first objection is, that this case is not within the statute at all; but it would be even within the 1st statute 33 Hen. 8, c. 1; because that statute provides for the offence of obtaining money by counterfeit letters in other men's names: but the more recent statutes of 30 Geo. 2, c. 24, and 7 & 8 Geo. 4, c. 29, s. 53, have considerably extended the law upon this subject; and now any false pretence of an alleged existing fact, made with intent to defraud, and which succeeds in imposing upon the prosecutor, and inducing him to part with his money or goods, is a false pretence within the last statute, as was held this morning in *R. v. Woolley*: (*supra*, p. 195.) Lord Kenyon, in *Young v. The King* (3 T. R. 98), remarks upon the generality of the language of stat. 30 Geo. 2, c. 24; and adds, "when the criminal law happens to be auxiliary to the law of morality, I do not feel any inclination to explain it away." (*Villeneuve's case*, there cited, p. 104.)

In the court below, the prisoner's counsel contended that there must be some pretended obligation on the part of the prosecutor to give, or advantage to him from giving; and that, therefore, a mere charitable gift, though obtained by a false pretence, was not within the statute: but *R. v. Crossley* (2 Moo. & R. 17), which was the case of a loan, answers that objection. It was also contended that the prisoner was punishable under the Vagrant Act, 5 Geo. 4, c. 83, s. 4, which provides expressly for the offence of going about collecting alms under false pretences; but even if he was, it by no means follows that he has not committed an offence under 7 & 8 Geo. 4, c. 29, s. 53; 1 Inst. 127. [LORD CAMPBELL, C. J.—There can be no doubt that this is a false pretence within the statute.] Then, the question of venue is easily disposed of. By 7 Geo. 4, c. 64, s. 12, an offence began in one county and completed in another, may be tried in either.

ALDERSON, B.—The postmaster at Sunbury was the agent of the prisoner.

Judgment.

LORD CAMPBELL, C. J.—Yes; there was an obtaining in Middlesex.

PARKE, B.—And as to the other count, the pieces of paper were of value.

ALDERSON, B.—The second was of the value of 5*l*.

*Conviction affirmed.*

## CROWN CASE RESERVED.

*April 27, 1850.*

(Before LORD CAMPBELL, C. J.; PARKE, B.; ALDERSON, B.;  
CRESSWELL J.; and ERLE, J.)

REG. v. SANSOME. (a)

*Prisoner's statement before magistrates, taken under 11 & 12 Vict. c. 42,  
s. 18—Admissibility of—Effect of proviso.*

*If, upon the trial of an indictment, the depositions taken before the committing magistrates contains a statement by the accused, in the form (N.), given in the schedule to 11 & 12 Vict. c. 42, that statement is admissible in evidence, on the part of the prosecution, without further proof.*

*If the statement is not taken in that form, it may still be given in evidence against the prisoner, upon proof of the signature of the magistrate, and that the statement was read over to, and signed by, the prisoner. If it should appear that any inducement or threat had been held out to the prisoner before he was taken before the magistrate, then, in order to let in evidence of a statement made before the magistrate, it would be necessary to prove that he was then cautioned by the magistrate, in such a manner as to remove the effect of the previous threat or inducement; but the particular enactment contained in the first proviso to sect. 18, is directory only.*

THE prisoner was tried for murder at the last Nottinghamshire assizes, before Lord Campbell, C. J., who reserved the following case:—

The prisoner was tried before me at the last assizes for the county of Nottingham, for the murder of Elizabeth Bailey, by introducing his finger into her womb, with the intention of procuring abortion.

For the prosecution, there was offered in evidence a declaration made by him before the committing magistrate in the annexed form.

The magistrates' clerk, who was called to prove it, stated that, when the prisoner was before the magistrate, the witnesses for the prosecution being examined in his presence, the magistrate thus addressed him:—"Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" that the magistrate added nothing more; that the prisoner then made the declaration, which was taken down, read over to him, and signed by him, and that it was signed by the magistrate.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

REG.  
v.  
SANSOME.  
—  
*Prisoner's  
statement—  
Evidence.*

The prisoner's counsel objected that, under the 11 & 12 Vict. c. 42, s. 18, the declaration was not admissible, as the magistrate had not stated to the prisoner, or given him clearly to understand, "that he had nothing to hope from any promise of favour, and nothing to fear from any threat which might have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he should then say, might be given in evidence upon his trial, notwithstanding such promise or threat."

I admitted the declaration, and reserved the point for the opinion of the judges.

The prisoner was found guilty, and sentence was passed upon him.

Nottinghamshire, to wit.—John Sansome stands charged before the undersigned, one of Her Majesty's justices of the peace in and for the county of Nottingham, this 12th day of May, in the year of our Lord 1849, for that he, the said John Sansome, on the 19th day of April last, at the parish of Ashfield, in the said county, unlawfully and feloniously used an instrument to the person of one Elizabeth Bailey, she then and there being with child, with intent then and there to procure the miscarriage of the said Elizabeth Bailey; and the said charge being read to the said John Sansome and the witnesses for the prosecution, Richard Soulding, Mary Ann Ascroft, Lucy Bailey, John Simon Turner, William Picken, and David Richardson, being severally examined in his presence, the said John Sansome is now addressed by me as follows:—"Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial." Whereupon the said John Sansome saith as follows:—"As regards the charge of introducing any instrument, upon examination, I found it was impracticable, on account of the narrowness of the passages, and the apex of the womb lying so high up that I could not reach to feel it; in consequence of that, I withdrew my fingers and observed, 'you will be all right now.'

(Signed)

"JOHN SANSOME."

"The above examination was taken before me at Mansfield, in the said county, on the day and year first-mentioned.

(Signed)

"J. SALMOND."

*Mellor* for the prisoner.—Before the recent statute 11 & 12 Vict. c. 42, a confession made under the influence of hope or fear was always held inadmissible,—if the inducement or threat was held out by any person having authority, that is, any person at all connected with the prosecution; but the effect of such inducement or threat might be so far removed by a proper caution on the part of the committing magistrate as to render admissible any statement made by the accused before him. This frequently led to a question whether the caution given by the magistrate was sufficient for that purpose; great uncertainty prevailed, and justice was not un-

frequently defeated. In *Smith's case* (2 Russ. on Crimes, 833), the caution was considered insufficient; so in *Sexton's case* (2 Russ. 832; 1 Burn's Just. (D'Oyl. & Wms.) 1086); but in *Rosier's case* (1 Phill. Evid. 411), the caution given was deemed sufficient. The consequence was, that some justices had even gone so far as to prevent prisoners from making any statement before them, which was clearly wrong: (*R. v. Arnold*, 8 Car. & P. 621; *R. v. Green*, 5 Car. & P. 312.) The 7 Geo. 4, c. 64, s. 2, which regulated the taking of examinations until the passing 11 & 12 Vict. c. 42, is now repealed by that statute; the object of which was to remove all question as to the sufficiency of the caution given by the magistrate, by requiring him to adopt a particular form of caution prescribed by the statute. The recital of the statute shows, that its object was "to define clearly by positive enactment" the duties of justices with respect to persons charged with indictable offences; sect. 17 makes the provision in question applicable to all cases, and then sect. 18 enacts, "that after the examination of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace, or one of the justices by or before whom such examination shall have been so completed as aforesaid shall, without requiring the attendance of the witnesses, read or cause to be read to the accused, the depositions taken against him, and shall say to him these words, or words to the like effect: "having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" and whatever the prisoner shall then say in answer thereto shall be taken down in writing (N.) and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always that the said justice or justices before such accused persons shall make any statement, shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt; but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat; provided nevertheless, that nothing herein enacted or contained shall prevent the prosecution in any case from giving in evidence any admission or confession or other statement of the person accused or charged made at any time, which by law would be admissible as evidence against such person." Now it is submitted, that compliance with that first proviso is a condition precedent to

REG.  
v.  
SANBOME.  
—  
Prisoner's  
statement—  
Admissibility.

Argument for  
the prisoner.

REG.  
v.  
SANSOME.  
—  
*Prisoner's  
statement—  
Admissibility.*

the admissibility in evidence of any statement made by the prisoner before the magistrate. The statute assumes that the prisoner may be under the influence of some previous threat or inducement, and therefore requires the magistrate to give a particular caution *before* he receives any statement of the prisoner.

ALDERSON, B.—What do you say to the last proviso?

*Mellor*.—That applies only to statements made by the prisoner to other persons or upon other occasions, which the section does not profess to deal with, and the distinction is reasonable, because a statement made solemnly before a magistrate has always greater effect against a prisoner than a statement made under other circumstances: (*Post. Discours. of High Treason, Sup. 3, s. 8.*)

LORD CAMPBELL, C. J.—The words of the last proviso “at any time” must embrace the time when the accused is before the magistrate.

*Mellor*.—Then the section is almost useless. It requires the magistrates to do a certain act, but attaches no consequence to his neglect of that duty.

ALDERSON, B.—The section makes the statement admissible upon mere production, if there is no evidence of any previous inducement or threat. If there is such evidence and the caution required by the statute has been given, that is enough. If it has not, then the question remains, as before the last statute.

Argument for  
the prisoner.

*Mellor*.—That advantage is very trifling, for there never was any difficulty in proving the magistrate's signature. [ALDERSON, B.—It is very wise to give the second caution in every case.] Formerly it was optional with the magistrate to give or withhold the caution, and it is submitted that the object of the statute was to take away that option and make the giving of it obligatory. So indeed Coleridge, J. and Cresswell, J. appear to have thought in *R. v. Kimber* (3 Cox Crim. Cas. 223.) In *R. v. Steel* (13 Just. P. 606), Erle, J. admitted a statement taken in the statutory form without further proof; but the present question did not arise there.

ERLE, J.—It was intended to be a direct decision against you.

*Mellor*.—It was not, however, necessary to decide the question in that case, and *The Mayor, &c., of Salford v. Acker* (16 Mee. & W. 85), is a strong authority to show that a proviso, such as this must be construed as imposing a condition precedent upon the right conferred in the earlier part of the clause.

*S. C. Denison*, contra, was not called upon.

Judgment.

LORD CAMPBELL, C. J.—We are all of opinion that this objection is unfounded; and I reserved the case, not on account of any doubt which I myself felt upon the subject, but in deference to doubts which had been entertained by some of my learned brothers. Now in this case, not only is the signature of the magistrate to this statement proved, but also the signature of the prisoner himself, after it had been read over to him. It was therefore admissible at common law, and was admissible upon this trial unless

here is something in the recent statute which prevents its reception. Now it has been argued very powerfully as might have been expected from Mr. Mellor, that the statute makes it a condition precedent that the magistrate should "state to the prisoner and give him clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him, to induce him to make any admission or confession of his guilt; but that whatever he shall then say may be given in evidence against him upon his trial notwithstanding such promise or threat;" but in this case there was no evidence of any promise or threat whatever, and therefore there could be no necessity for showing that any caution had been given; or I am of opinion that the giving of such caution cannot be a condition precedent to the admissibility of every declaration made by a prisoner before a magistrate read over to him and signed by him. It seems to me that that proviso contains merely a direction to the magistrate how to proceed, and not a condition precedent. If he neglects his duty, there is no clause of nullity in the statute, nothing to exclude a confession which would be admissible at common law. Then we look to the schedule: a form is there given, which was adopted in this case, and that form embodies the first caution but not the second. Whether the giving of the first caution even is a condition precedent to the admissibility of the statement it is not necessary now to determine; at all events the giving of the second caution is not, where there is no evidence of any previous threat or promise. Judgment.

REG.  
v.  
SANSOME.  
—  
Prisoner's  
statement—  
Admissibility.

PARKE, B.—I am entirely of the same opinion; and I do not mean at all to say that there is any reason to doubt that the first caution as well as the second is not a condition precedent to the admissibility of the statement. The last proviso seems to override both cautions.

ALDERSON, B.—Mr. Mellor gives no effect to the words of the first proviso "at any time;" he reads it as if it were "at any other time."

CRESSWELL, J. concurred.

ERLE, J.—I am entirely of the same opinion; but it may be desirable now to state also the opinion of the court upon the other question whether the examination when transmitted by the committing magistrates in the statutory form is admissible without other proof; and certainly my opinion is, that if the first caution stated to have been given as in the form in the schedule, and that examination is transmitted in due course by the committing magistrate to the court before which the trial is to take place, the statement is then admissible without any further proof.

LORD CAMPBELL, C. J.—I entirely concur in that opinion.

PARKE, B.—*Primâ facie* the examination is right if it purports to be signed by the magistrate, and there is no evidence that he did not sign it; and I think it would be admissible if neither of the cautions was stated to have been given.

LORD CAMPBELL, C. J.—At all events we are all agreed upon

REG.  
v.  
SANSOME.  
—  
Prisoner's  
statement—  
Admissibility.

this,—that if the statement is returned, purporting to be signed by the magistrate, and bearing upon the face of it the first caution, it is admissible without any evidence.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*April 27, 1850.*

(Before LORD CAMPBELL, C. J., PARKE, B., ALDERSON, B.,  
CRESSWELL, J. and ERLE, J.)

REG. v. ADEY. (a)

### *Embezzlement—Collector of poor rates—Property.*

*A person employed by the overseers of a parish to collect the poor rates, received the amount of rate due in respect of certain property from the landlord, whose name was not in the rate book, but who was in the habit of paying the rates, instead of the occupier, who was the person rated, and embezzled the same.*

*Held, that he was properly convicted of embezzlement, upon an indictment charging him as servant to A. B. and C. D. (the overseers), and describing the money collected as the property of the said A. B. and C. D., his masters.*

THE prisoner was tried for embezzlement before the Recorder of New Sarum, by whom the following case was stated for the opinion of the judges:—

### CASE.

Case.

At the General Quarter Sessions of the Peace, held on the 31st day of December, 1849, at Salisbury, before the recorder, Charles John Adey was indicted for embezzlement. The 1st count stated that the prisoner, being employed as servant to Henry James Bracher and Robert Fritcher, on the 13th of May, 1849, received 5s. 1½d. on account of his masters, and embezzled it.

It alleged the money to be the property of the said H. J. Bracher and R. Fritcher, his masters. The 2nd and 3rd counts, which were similar in form to the first, alleged the embezzling of other sums on the 29th of June, 1849, and 13th of October, respectively.

The prisoner pleaded not guilty.

On the trial it was proved that Henry James Bracher and Robert Fritcher were the two overseers of the poor of the parish of Fisherton Ongar, in the borough of New Sarum; there were also two other persons churchwardens of the same parish. Previous

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

to May, 1849, the two overseers had employed the prisoner to collect the poor rates in their stead, and at a salary. As such collector, he had to collect two poor rates—one made on the 10th of May, the other on the 12th of June, 1849. On the 15th of May, 1849, the prisoner called on one James Peavey, and demanded the amount of the rate in respect of certain premises of which one Fawcett was described in the rate book as occupier, and James Peavey as owner. The latter was in the habit of paying the poor rates on behalf of his tenants, and he then, consequently, paid to the prisoner the sum of 5s. 1½d., which was the amount due under the rate for the premises in question. The prisoner gave him a receipt for the same, as the collector of poor rates. On the 29th of June, the prisoner called on one George Hopkins, who occupied the premises mentioned in the rate of the 10th of May, 1849, and demanded of and received from him the amount of the rate assessed on them. Hopkins's name was not inserted in the rate book as their occupier, nor was any person named in the rate book as their occupier. On the 13th of October, 1849, the prisoner, accompanied by Bracher, called at George Hopkins's house, and demanded of, and received from, the wife of George Hopkins the amount of the July rate, assessed in respect of the last-mentioned premises. The prisoner, in his accounts, did not acknowledge the receipt of any of these sums, but entered in the rate book, which he delivered with his accounts to the overseers, that the amount of Fawcett's was uncollected, being legally excused; and, in respect of Hopkins's premises, that the amounts were uncollected, as the premises were void. He appropriated the sums to his own use.

REG. v. ADEY.  
—  
*Embezzlement by  
collector of  
poor rates.*

It was objected, on behalf of the defence, by the counsel for the prisoner, first, that the said C. J. Adey was not the servant of the prosecutors, Messrs. H. J. Bracher and R. Fritcher, for the purpose of receiving the money, in the 2nd and 3rd counts mentioned, inasmuch as the name of the said G. Hopkins not being in the said rates, he was not bound to pay the rates, therefore the said C. J. Adey had no right to demand or receive the same from him. Secondly, that as the name of the said G. Hopkins was not inserted in the said rates, the said C. J. Adey did not, nor could, receive and take the money, by virtue of his employment, as a servant, for and in the name of, and on account of, the prosecutors, he not being empowered so to do, the said C. J. Adey only having an authority to collect from persons whose names appeared in the rate. Thirdly, that the money collected was not, and could not be, the property of the said H. J. Bracher and R. Fritcher, inasmuch as they themselves could not collect or enforce payment of the same from the said G. Hopkins, his name not appearing on the respective rates, and therefore the said C. J. Adey had no right or authority to receive it on their account. Fourthly, that the said moneys, as laid in all the counts, were not the property of the said H. J. Bracher and R. Fritcher, inasmuch as there were churchwardens as well as overseers of Fisherton

Case.



REG. V. ADEY. *Embezzlement by collector of poor rates.* Ongar, and that if the money belonged to the overseers at all, it was the joint property of, and belonged to, the overseers and churchwardens, and ought to have been laid as such in the indictment, and not as the property of the said J. Bracher and R. Fritcher, the prosecutors, alone, and therefore, that the moneys were improperly laid in the three counts, respectively; and that, consequently, the indictment was bad.

The recorder overruled the objection, but reserved the said points for the opinion of the judges.

The jury found the prisoner guilty, on all the three counts; and the prisoner was discharged, on bail, to appear at the next Quarter Sessions of the Peace, to receive judgment.

Argument for prisoner.

*Arney*, for the prisoner.—These sums were not received by virtue of the prisoner's employment, because they were received from persons not rated. The poor rate is a personal tax: (*R. v. Brown*, 8 East, 528; *Case v. Stephens*, Fitzg. ib. 297; *Sir A. Earby's case*, 2 Bulstr. 354.) [LORD CAMPBELL, C. J.—The power to enforce payment against persons not rated, is one thing; the authority of the prisoner to receive is another.] There is no evidence of any authority but that derived from his employment to collect the rates. [CRESSWELL, J.—Had he not authority to receive the rates from any one who offered to pay them?] [PARKE, B.—Surely he might receive them from the landlord who had been in the habit of paying them.] That may be so; but then the property is not laid in the churchwardens and overseers. [ERLE, J.—Do not the rates belong to the overseers?] [PARKE, B.—At all events, they take upon themselves the burden of collection: the prisoner was their agent, and accountable to them.] [LORD CAMPBELL, C. J.—If it be true that he received them by virtue of his employment for and on account of the prosecutors, does it not follow that the money belongs to them?] The money, when collected, becomes the property of the churchwardens and overseers.

Judgment.

LORD CAMPBELL, C. J.—If so, the two overseers would be liable to the whole body; and there is a sufficient property in them.

*Conviction affirmed. (b)*

(b) See sect. 15 of 12 & 13 Vict. c. 103, which enacts "that in respect of any indictment or other criminal proceeding every collector or assistant overseer appointed under the authority of any order of the poor-law commissioners or poor-law board, shall be deemed and taken to be the servant of the inhabitants of the parish whose money or other property he shall be charged to have embezzled or stolen, and shall be so described; and it shall be sufficient to state any such money or property to belong to the inhabitants of such parish, without the names of any such inhabitants being specified."

## COURT OF QUEEN'S BENCH.

TRINITY TERM.

May 22, 1850.

REG. v. BETTS AND OTHERS.(a)

*Nuisance—Obstruction of navigable river—Finding of jury.*

*Upon an indictment for a nuisance at common law by obstructing a public navigable river, it is a question of fact for the jury whether the navigation was in fact impeded; and every unauthorized erection in a river is not necessarily an indictable obstruction. When, therefore, a jury found that the defendants were guilty of building a bridge, but that the erection did not obstruct or impede the navigation:*

*Held, that that was a verdict of acquittal.*

**I**NDICTMENT for a nuisance at common law by obstructing the navigation of the river Witham, in the county of Lincoln. The obstruction consisted in the erection of a bridge, near to a lock or sluice; and so constructed that one of the arches of the bridge left a space for the passage of vessels as wide as that afforded by the sluice. The defendants were employed by the Great Northern Railway Company, and the bridge was built to carry that railway over the river. By the company's acts of Parliament (9 & 10 Vict. c. lxxi.; c. lxxxviii.; 12 & 13 Vict. c. lxxxiv.) they were authorized to build a bridge over the Witham at another part of the river; and the bridge was built by the company at the place in question by arrangement with the Witham Navigation Commissioners, who considered that the erection of the bridge at that place would be more convenient to the navigation than its erection at the place authorized by the acts of Parliament. At the trial, which took place before Wilde, C. J., at Lincoln, during the Spring Assizes, 1849, it was contended that the Witham was not a public navigable river; that the railway company must be taken to stand in the same situation as the navigation commissioners, and that the navigation commissioners would, under their acts of Parliament (2 Geo. 3, c. 32; 48 Geo. 3, c. 108; 52 Geo. 3, c. 108), have had authority to build the bridge; and further, that the bridge, where built, was no greater obstruction than it would have been at the place pointed out by the Railway Act. The learned judge left to the jury the question whether the navigation had been substantially obstructed; and the jury found that the defendants were guilty of building the bridge, but that the erection did not impede or obstruct the navigation. Upon that finding the judge directed the verdict to be entered for the crown upon the 6th count, to

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

REG.  
v.  
BETTS AND  
OTHERS.  
—  
Obstruction of  
navigable river  
—Verdict.

which it applied; and a verdict of not guilty was entered upon the rest.

Pursuant to leave reserved, a rule was moved for and obtained in the following term, to enter a verdict of not guilty upon that count.

May 8 and 22.

*Whitehurst, Mellor, and Flowers*, showed cause.—The erection of a bridge must necessarily obstruct a public river; and in order to give the verdict a sensible meaning, it must be construed as if it had said that the erection did not obstruct the river more than it would have been obstructed by the bridge which the company were authorized to build. So reading it, it amounts to a verdict of guilty; because the jury were not at liberty to consider the balance of convenience. (They referred to *R. v. Russell*, 6 B. & C. 566; *R. v. Cross*, 3 Camp. 227; *Bateman v. Burge*, 6 Car. & P. 391; *James v. Hayward*, Cro. Car. 184; 1 Hawk. P. C. c. 76, s. 144; *R. v. Ward*, 4 Ad. & E. 384; *Williams v. Wilcox*, 8 Ad. & Ell. 314; *The Mayor of Colchester v. Brook*, 7 Q. B. 339; *R. v. Randall*, Car. & M. 496; *R. v. Tindall*, 6 Ad. & E. 143.) 2. That this was a public navigable river is perfectly clear. The statute 2 Geo. 3, expressly recites that it was so, and provides for the removal of obstructions. (The argument on other points is omitted.)

*Humfrey and Macaulay*, contra.—Lord Hale (*de Port. Maris*) expressly lays it down that the question of nuisance or no nuisance is a question of fact for the jury; and in *R. v. Russell*, Lord Tenterden admitted that the jury ought to be asked whether the navigation was injured, although he denied that they ought to enter into any question of more or less convenience. *R. v. Ward* (4 Ad. & Ell.) is to the same effect; and here the proper question was put to the jury—that is, whether the navigation was at all prejudiced by this erection; and they have distinctly said that it was not. No words could express their meaning more clearly than those which they used; and the facts will warrant their verdict. All the vessels navigating the river were obliged to pass through the sluice, and the width of the arch was as great as that of the sluice, close to which it was built. The verdict, therefore, is one of “not guilty.” But even if not, there is no evidence of this being a public navigable river. In effect, the statute 2 Geo. 3, shows that it has ceased to be a public river, if it ever was so; and the only evidence that it ever was so is the recital in the same statute. (They referred to some sections of the local acts to show that the Navigation Commissioners might have built the bridge under the powers thereby conferred upon them.)

Judgment. LORD CAMPBELL, C. J.—I cannot doubt that this is a public navigable river. The act of Parliament recites that it was so, and had become impeded; but a highway does not cease to be a highway because it is out of repair; it must be put into repair; and there is nothing to show that this has ceased to be a public navigable river. I also entertain no doubt that this cut is in the same condition as if it had been the old course of the river; and that if

a bridge had been built, which had obstructed the navigation there, it would have been indictable as a nuisance at common law. As to the powers of the commissioners, I am of opinion that they are strictly limited to the purposes of the navigation, and would not authorize them to build a bridge for carrying a railway over the navigation, or any such purpose; but then, when I look at the verdict, it seems to me that it is clearly a verdict of not guilty. According to the authority of Lord Hale, according to the opinion of Lord Tenterden in *R. v. Russell*, and the judgment of this court in *R. v. Ward*, it is a question for the jury, whether the erection is to the damage of the navigation. As to there being compensation from the benefit conferred upon the neighbourhood generally, I cannot concur with the majority of the judges in *R. v. Russell*. The question is, whether there has been a damage to the navigation in that locality; the indictment must conclude *ad commune nocumentum*; and that is a question of fact, as Lord Hale says, which is to be left to the jury, and not decided by the court. Here it was left to the jury; and the jury find that the bridge is no obstruction to the navigation. It is suggested that the verdict is impossible and absurd; but the verdict stands, and no application is made to set it aside; nor, indeed, do I think there could be. One can easily conceive a bridge so built as to offer no obstruction to vessels sailing up and down the river; and looking at the model in this case, I should say that the jury have come to a right conclusion. The arch of the bridge leaves as wide a space as the sluice; and it seems to me, therefore, that for the purpose of the navigation, things remain as commodious as before. At all events, looking at the terms of the verdict, I am clearly of opinion that it amounts to an acquittal, and that a verdict of not guilty ought to be entered.

PATTESON, J.—I also think that this was a public highway. The recital of the statute is very clear; its object is to restore the navigation; and it expressly provides that it shall be a common highway for all Her Majesty's subjects. Then, as to the question of obstruction, that is one of fact, and the jury have determined that there is no obstruction. Therefore this rule must be absolute. The law is laid down pretty strongly in the treatise *de Portibus Maris*, which is, I suppose, the treatise of Lord Hale, notwithstanding what my brother Merewether has said on that subject.

COLERIDGE, J. concurred.

ERLE, J.—I am of the same opinion. If the question had not been disposed of by the verdict of the jury, it would have been important to consider how far the public right of way was affected by the qualifications imposed by the 2 Geo. 3, and the other acts.

*Rule absolute.*

REG.  
v.  
BETTS AND  
OTHERS.

Obstruction of  
navigable river  
—Verdict.

Judgment.

## COURT OF CRIMINAL APPEAL.

June 1, 1850.

(Coram WILDE, C. J.; ALDERSON, B.; PATTESON, J.;  
COLERIDGE, J.; and PLATT, B.)

REG. v. MATTHEWS.(a)

*Joint receiving by husband and wife—General verdict—Evidence.*

*Husband and wife were jointly indicted for feloniously receiving stolen property. The evidence proved a separate act of receiving by the husband. The jury returned a general verdict of guilty against both. Held, that the verdict was divisible, and the conviction might be reversed as to the wife and affirmed as to the husband.*

*The stolen property was found at the house in which the prisoners lived, when the husband was not at home; but afterwards, when the property was shown to him, he stated that he had bought it of A. B., who was in custody on the charge of stealing it.*

*Held, sufficient evidence of a receipt by him.*

THE following case was reserved by the Assistant-Chairman of the Staffordshire Sessions:—

## CASE.

Case.

At the last Epiphany Quarter Sessions for the county of Stafford, Alexander Jameson and Joseph Tomlinson were charged with stealing a quantity of fowls, and William Matthews and Ellen Matthews, his wife, dealers in poultry, with receiving the same fowls, well knowing them to have been feloniously stolen.

The prisoners were all found guilty, and the question for the court is, whether the receivers were properly convicted. The evidence against them is as follows:—

Charles Welch, police-officer, went to Matthews's house on the 22nd of December: the fowls were stolen on the 17th of December. Saw Mrs. Matthews. Asked her where all those fowls and geese came from? She said she bought part and her husband some. She said her husband was not by when she bought them. She also said she bought hers from people who came to the house, and her husband bought his on Wednesday at Shrewsbury Market. I asked her if she had any unplucked, and she said "Yes; four up stairs." I was going up, and she said she had rather I did not till her husband came. When Rofe, police-officer, came, we went up stairs and found between twenty and thirty unplucked and

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

eleven plucked. Rofe and Woolley took the unplucked ones. I afterwards saw William Matthews at the police-station. He said he was not out of Walsall on Wednesday (Shrewsbury market-day.) I know the prisoners Jameson and Tomlinson; they live together. Tomlinson is a miner, and brother of Mrs. Matthews. Cross-examined: Tomlinson has a brother, who lives 150 yards from him. He is a much larger man than the prisoner—five feet ten inches high.

REG.  
v.  
MATTHEWS.  
—  
*Joint receiving*  
—Husband and  
wife—Evidence

George Woolley, constable, Walsall.—Apprehended Tomlinson, and gave his shoes to Price, police-officer. Found tracks of three persons where fowls were stolen—one made by shoes of prisoner Tomlinson: (shoes small, and nails remarkable, shown to jury.)

John Rofe, chief constable of Walsall police.—Evidence same as Welch, given before, and in addition produced some of the fowls from Matthews's house, identified by prosecutor. Took William Matthews into custody at Turk's Head, Walsall. When at station-house showed him fowls identified by prosecutor, and asked from whom he had them? He hesitated. Witness said, "We have got your wife's brother, Tomlinson, in custody. Did you not buy the fowls from him?" He said, "I did." (Rofe was reprimanded by Case. the court for putting this question.)

In his summing up to the jury the Chairman said, "You observe Ellen Matthews says her husband bought part of the fowls at Shrewsbury, and she bought part of them from people who came to the house, and that her husband was not by when she bought them. If you are of opinion that the female prisoner knowingly gave a false statement of the way she received the fowls, you will have to consider how far such false account conveys the impression to your minds of her guilty knowledge. But if you should be of opinion that her statement is false, it can have no effect as against her husband, because he cannot be injured by a statement made by his wife in his absence. As regards William Matthews, Rofe says he told him he had Tomlinson in custody, and Matthews replied, 'I bought the fowls from Tomlinson;' and you are told Tomlinson is a miner, and brother-in-law of Matthews; and you will have to say by your verdict whether you are of opinion that William Matthews knew Tomlinson had stolen the fowls when he received them from him."

The above is the evidence and the summing up against the receivers. Mr. Kettle for the prisoners, submitted that the chair- Argument for prisoner.  
man ought to direct the jury that if they believed the wife had received them in the absence of her husband, and without his knowledge, she alone should be found guilty; and as to the wife, that they should not find her guilty unless they believed that she had received the fowls in the absence of her husband; but it appeared from the evidence that the receiving by the two prisoners was at two different times, and it did not appear to the court that one receiving only had been proved.

On the application of Mr. Kettle for the prisoners, judgment was postponed on William Matthews and Ellen Matthews, and the ques-

REG.  
v.  
MATTHEWS.  
—  
Joint receiving  
—Husband and  
wife—Evidence

tion on which the opinion of Her Majesty's judges is desired, is—

Whether the above mentioned directions, suggested by Mr. Kettle, ought to have been given to the jury in addition to what was stated by the chairman in his summing up? and

Whether, upon the evidence as above stated, the receivers were properly convicted?

*Kettle*, for the prisoners.—This conviction must be reversed. The jury have found a joint act of receiving, and there was no evidence whatever to support such a finding.

PATTESON, J.—The case states that the receiving by the two prisoners was at two different times.

*Kettle*.—The conviction, therefore, cannot be sustained.

PLATT, B.—The statement made by the husband would apply to all the fowls.

PATTESON, J.—I cannot see that the fowls which the wife received are shown to be the prosecutor's.

ALDERSON, B.—There is no evidence at all against the wife of receiving the fowls which are identified, and that gets rid of all difficulty about the verdict. She is entitled to an acquittal, but the conviction of the husband stands.

*Kettle*.—It is impossible to tell upon what ground the verdict proceeded; the jury may have thought that the husband was implicated in the first receipt by the wife. The finding, therefore, cannot now be divided.

Argument for  
prisoner.

PLATT, B.—It is quite plain, upon the summing up, as reported to us, that it may properly be divided.

*Kettle*.—Secondly, there is no evidence of a guilty receiving by the husband. Everything depends upon his own statement, which would equally apply to either of the brothers Tomlinson.

*Vaughan* for the prosecution.—The verdict of the jury settles which of the two Tomlinsons was meant.

WILDE, C. J.—Yes, there is nothing in that.

*Kettle*.—Lastly, there is no proof of an actual receiving by the husband: (*Hill's case*, 1 Den. Cr. C. 453; 3 Cox's C. C. 533.) The property is not shown to have actually reached the hands of the husband.

COLERIDGE, J.—He says that he bought them, and they are found in his house, surely that is sufficient evidence of possession.

WILDE, C. J.—*Hill's case* was quite different. There the property was sent by a carrier, and the prisoner called at the carrier's office for it; but before it was even delivered to her she was taken into custody.

ALDERSON, B.—The case of *R. v. Wiley*, which was argued here last term, is much nearer to this case; (b) but there the only evidence against the prisoner was that the stolen property was taken by the thieves into a stable belonging to his father, and that he was there with them bargaining about it. That case is under consideration now.

(b) No judgment has yet been given in *R. v. Wiley*.

*Vaughan* for the prosecution.—As to the wife, she might be guilty of a constructive receiving.

PLATT, B.—Then she would be *sub potestate viri*.

ALDERSON, B.—This is different from *Reg. v. Parr* (2 Moo. & Rob. 345); though it was admitted there that a mere subsequent assent by a master to a felonious receiving by his servant would not support a joint indictment. That case went upon the ground that the master had previously directed the servant to receive the stolen property. Here there is no evidence of previous concert.

PATTESON, J.—If it be a joint receipt, how can you convict the wife?

WILDE, C. J.—We all think that the conviction of the husband should be affirmed; that of the wife reversed.

*Judgment accordingly.*

REG.

v.

MATTHEWS.

Joint receiving  
—Husband and  
wife—Evidence

## COURT OF CRIMINAL APPEAL.

June 1, 1850.

(Before WILDE, C. J.; ALDERSON, B.; PATTESON, J.;  
COLERIDGE, J.; and PLATT, B.)

REG. v. MOORHOUSE JAMES.(a)

*Indictment against a clergyman for refusing to marry—Evidence.*

*To support an indictment for refusing to marry, there must be evidence that the parties desirous of being married presented themselves to the clergyman for that purpose at a time and place at which the ceremony could be lawfully performed, and then requested him to marry them.*

*Where, therefore, upon the trial of such an indictment, it appeared that the only occasion upon which the parties offered themselves to him to be married was at nine o'clock in the evening, and not in the church:*

*Held, that this was not a sufficient tender of themselves to entitle them to proceed against the clergyman for his refusal, although he stated his ground of objection to be that the man had not been confirmed, and intimated his readiness to marry them whenever the man expressed a desire to be confirmed.*

*Semble, per Alderson, B., that if the refusal was wrong, the offence was an ecclesiastical offence only.*

THIS was an indictment charging the defendant, a clergyman of the Church of England, with refusing to marry two persons, for whose marriage on any day, before August 14, the super-

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.



REG.  
v.  
MOORHOUSE  
JAMES.

Indictment for  
refusing to  
marry.

intendant-registrar's certificate had been obtained pursuant to 1 Vict. c. 22. It appeared at the trial, which took place before Alderson, B., that the parties went to the clergyman on August 2, at about nine in the evening, and requested him to fix a time for marrying them; that, having ascertained that the man had not been confirmed, he replied that he would marry them whenever the man expressed a desire to be confirmed. Many points were raised at the trial, and reserved by the learned judge for the opinion of this court; but the case was ultimately decided upon the single point whether the facts above stated proved a sufficient request to the clergyman to marry the parties, and a sufficient tender of themselves to him for that purpose. The argument on the other points is omitted.(b)

*Bliss*, for the defendant.—No offence was proved, because there has been no sufficient demand and refusal.

WILDE, C. J.—A tender must generally be made where it can be accepted.

PLATT, B.—No request to marry appears at all; only a request to appoint a time for marrying.

*Bliss*.—The parties were bound to give him notice to attend at the church for the purpose of marrying them.

PATTESON, J.—Unless the language which he used dispensed with the necessity for so doing: (*Ripley v. McClure*, 18 L. J. 419, Exch.)

Argument for  
the prisoner.

*Bliss*.—The defendant could not dispense with the performance of conditions required by law.

WILDE, C. J.—Is there not a distinction between the case in which a man is in a situation to perform the condition at the time when it is waived, and the case of a man who is not?

ALDERSON, B.—I take it, in the latter there would be no waiver.(c) It certainly would have been unlawful for the defendant to have performed the marriage ceremony when these parties presented themselves.

PATTESON, J.—It does not appear by the evidence that the man ever gave such an answer to the clergyman as negatived the pos-

(b) *Bliss* contended that the defendant was justified in refusing, because there were lawful impediments. It was a lawful impediment that the man was not in a fit condition to receive the holy communion, he not having been confirmed nor having expressed his readiness to be confirmed. (He cited the Rubrics and Formularies of the Church as found in the Book of Common Prayer; the 68th, 26th, and 27th Canons of 1603; 2 Hooker, 433; Jeremy Taylor, 666; Nicholl's Commentaries on Common Prayer, 60.) It was also a lawful impediment that the parties were minors, and no evidence was given of the consent of parents (he referred to the 62nd and 100th Canons); also, that they were at the time cohabiting together: (*Lapsley v. Grierston*, 1 H. L. Cas. 498.) 2. That there was no proof that the chapel was licensed for the solemnization of marriages, or that one of the parties lived within the district. 3. That the refusal to marry was not an indictable offence: (*Davis v. Black*, 1 Q. B. 900; *R. v. Richards*, 8 T. R. 634; *R. v. Price*, 11 Ad. & Ell. 727; *R. v. Nott*, 1 D. & M. 1; *R. v. Pawlett*, 2 Sid. 209; *Croucher's case*, Cro. El. 635; Co. Litt. 66, a.; *Lionel Copley's case*, Hardr.; *Middleton v. Crofts*, 2 Stra. 1056; *Campbell v. Alderson*, 2 Wils. 78; *Weymouth v. Collins*, 2 Ld. Raym. 850.) 4. The indictment is bad for containing no averment that the parties might lawfully marry; or that they come ready and willing to marry on the 14th of August; or that the church was within the registrar's jurisdiction (*Ex parte Bradell*, 8 Dowl. 332); or that the church was one in which marriages are lawfully celebrated; or that the defendant was in holy orders of the Church of England.

(c) *Ripley v. McClure* seems at variance with this opinion.

sibility of his becoming desirous to be confirmed before the 14th of August; and the defendant did not absolutely refuse to marry them. If in the interval the man had expressed his readiness to be confirmed, the defendant would have married him.

*Crompton* (with whom were Sir *J. Jervis*, A.-G., and *Knowles*) for the crown.—The offence is unlawfully refusing to marry at any time before the 14th of August; and that offence was complete on the 2nd. On that day the defendant refused to do the act, excepting upon a condition which he had no right to impose. The parties were made to understand that it would be useless to present themselves at the church; and they did right to avoid any indecent disturbance there.

**WILDE, C. J.**—No disturbance was necessary.

**ALDERSON, B.**—They tendered themselves when the marriage could not be performed.

The *Attorney-General* expressed a hope that the court would decide the main question, independently of any technical points.

**ALDERSON, B.**—My impression is that this is an Ecclesiastical matter altogether; besides which, there are two points very difficult to get over; first, the tender; secondly, the want of an averment that the parties could lawfully marry.

**PATTESON, J.**—Suppose we assumed now to decide the main question. The same objection might be taken after a regular publication of banns, and then clearly the refusal would not be an indictable offence in the common law courts. That case must go into the Ecclesiastical Court; and our decision now would not be binding at all upon that court. Why should we give an opinion which would not bind the church?

**WILDE, C. J.**—We all think that we ought not in this case to go out of our way for the purpose of expressing an opinion upon a point not necessary to the decision of this case, when we see that it has clearly failed upon another point. The defendant was not called upon to discharge the duty at the time when it could be performed.

**ALDERSON, B.**—I entirely agree; and I also think that it is not possible to get over the other point consistently with this indictment. These parties might be brother and sister by different fathers.

REG.  
v.  
MOORHOUSE  
JAMES.  
—  
*Indictment for  
refusing to  
marry.*  
—  
Argument for  
the crown

Judgment.

*Conviction reversed.*

## COURT OF CRIMINAL APPEAL.

June 1, 1850.

(Before WILDE, C. J.; ALDERSON, B.; PATTESON, J.;  
COLERIDGE, J.; and PLATT, B.)

REG. v. WILLIAM CASE.(a)

*Assault—Rape—Consent—Fraud.*

*A medical man, to whom a girl of 14 years of age was sent for professional advice, had criminal connection with her, she making no resistance from a bonâ fide belief that the defendant, as he represented, was treating her medically.*

*Held that he was properly convicted of an assault.*

*Semble, he might have been convicted of rape.*

THE following case was reserved by the Recorder of Dover:—  
William Case was tried before me at the last April Quarter Sessions for the borough of Dover, for an assault upon Mary Impitt.

Case.

The defendant was a medical practioner. Mary Impitt, who was fourteen years old, was placed under his professional care by her parents, in consequence of illness, arising from suppressed menstruation, and on the occasion of her going to his house, and informing him she was no better, he observed, "then I must try further means with you." He then took hold of her, and laid her down in his surgery, lifted up her clothes and had carnal connection with her, she making no resistance, believing (as she stated) that she was submitting to medical treatment for the ailment under which she laboured. The defendant's counsel, in his address to the jury, contended that the girl was a consenting party, therefore, that the charge of assault could not be sustained.

I told the jury that the girl was of an age to consent to a man having carnal connection with her, and that if they thought she consented to such connection with the defendant he ought to be acquitted; but that if they were satisfied she was ignorant of the nature of the defendant's act, and made no resistance, solely from a *bonâ fide* belief that the defendant was (as he represented) treating her medically, with a view to her cure, his conduct, in point of law, amounted to an assault.

The jury found the defendant guilty, and he was sentenced to be imprisoned for eighteen calendar months in the borough gaol, where he now remains. I have to pray the judgment of my lords,

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

justices, and others, sitting in a court of appeal, whether my direction to the jury was correct in point of law?

*Horn*, for the prisoner.—The consent of the girl is found; for consenting and not resisting are synonymous. [COLERIDGE, J.—They are clearly used in a different sense here. WILDE, C. J.—If a medical man uses an injurious ointment the patient does not resist its application; but it cannot be said that he consents. ALDERSON, B.—How does this differ from the case of a man pretending to be the husband of the woman.] Fraud is not expressly found in this case. It ought to have been left to the jury expressly to say whether the act done was necessary or proper. It is consistent with the verdict that he may have treated her medically. [ALDERSON, B.—He pretended that that was medicine which was not; hereby that is fraud.] In the notes to *R. v. Read* (1 Den. C. C. 379), it is said, “It seems from *R. v. Martin* (2 Moo. C. C. 123; 9 Car. & P. 213); *R. v. Banks* (8 Car. & P. 574); *R. v. Meredith* (8 Car. & P. 589), first, that the stat. 9 Geo. 4, c. 31, s. 17, does not deprive a girl under ten years of age of the power to consent which she had at common law; secondly, that consequently if she consents to the mere incomplete attempt, such an attempt is not punishable as an assault; thirdly, that it is punishable as an attempt to commit a felony, viz., as a misdemeanor;” and further, “an assault seems to be any sort of personal ill-usage, short of a battery(*b*) done to another against his consent. Therefore, such act, done with consent, is no breach of the peace or crime.” Children of tender age are, therefore, capable of consenting; so is an idiot: (*R. v. Ryan*, 2 Cox C. C. 115.) [PATTESON, J.—What do you say the jury found?] It is consistent with the verdict that he may have treated her medically. [COLERIDGE, J.—Suppose even that he did the act *bonâ fide* for the purpose which he pretended, would that justify him? Had he a right to pollute the child’s body?] Certainly not, morally; but the question is, was it an assault in the eye of the law, there being consent in fact. [PLATT, B.—The girl did not consent to that which was done. She did not know the nature of the act.] In *Read’s case* (1 Den. C. C. 377), the jury found that, from her tender years, the child did not know what she was about. Yet, as they found that she assented, the prisoners were held entitled to an acquittal upon the indictment, which charged them with an assault. [ALDERSON, B.—It must be taken that there was actual consent in that case.] Even if fraud was established, still there was no assault. The doctrine of rape *per fraudem* stands upon the decision of two judges, Alderson, B. and Gurney, B., in *R. v. Williams* (8 Car. & P. 286), and *R. v. Saunders* (*ib.* 265), in those cases the defendants were indicted for rape, and it appearing that the consent of the woman in each case had been obtained under the belief that the man was her husband, the learned judges directed that the prisoners should be acquitted of the charge of rape, but convicted of an assault. [ALDERSON, B.—In the case before me I followed

REG.  
v.  
WILLIAM CASE.  
—  
Assault—  
Consent—  
Fraud.

Argument for  
the prisoner.

(b) Surely not less an assault, because also a battery.

REG.  
v.  
WILLIAM CASE.  
—  
Assault—  
Consent—  
Fraud.

Argument for  
the prisoner.

several previous decisions, although I doubted them.](c) If they were guilty of an assault, and penetration was proved, why were they not guilty of rape? [ALDERSON, B.—Suppose a woman is ravished whilst under the influence of laudanum. I recollect a case before me on the Home Circuit, where, at the time when the offence was committed, the woman was completely insensible from drunkenness. I doubted whether the prisoner ought to be convicted of rape; but upon consultation with Lord Denman I held that he might.] *R. v. Camplin* (1 Den. C. C. 89; 1 Cox C. C. 220), was a somewhat similar case; but different in this,—that the prisoner gave the woman the liquor which made her drunk.(d) He therefore contributed to the production of the state of insensibility, during which the offence was committed; and if the woman does not consent as long as she has the power of consenting or resisting, a reasonable inference that she did not consent may be drawn from her previous conduct; the act would be done against “her permanent will,” as Lord Denman expresses it in *R. v. Camplin*; but if fraud dispenses with the necessity of resistance, any deceit will have that effect; and it would be an assault if the woman consented, upon a false representation that the man would marry her, or that medically it would be beneficial to her. If a surgeon cuts off a leg or draws a tooth, and the patient consents because he believes that he is being medically treated, could he afterwards indict him for an assault? Again, the charge of rape includes an assault; and is there to be one kind of consent for an assault and another kind of consent to get rid of the charge of rape? The cases, therefore, it is submitted, deserve to be reconsidered. [WILDE, C. J.—There are two cases which clearly show that this defendant was guilty of an assault, and you say that the court ought to have held him guilty of rape; but it would not be less an assault if it should be held to be rape.] If upon an indictment for assault a rape is proved, the misdemeanor merges in the felony;(e) but it is held that if the connection takes place by consent obtained by fraud it is not rape. If not, neither is it an assault.

*Barrow*, contrá, was not called upon.

Judgment.

WILDE, C. J.—I have no doubt in this case that the direction of the learned recorder was perfectly correct. The objection is to the latter part of the charge; for he first of all tells the jury that the girl was of an age to consent, and that, if she consented, the prisoner

(c) See *R. v. Jackson* (Russ. & Ry. 487.)

(d) The following is Baron Parke's note upon *R. v. Camplin* (see Add. to Part 1 of Den. C. C.):—“Of the judges who were in favour of the conviction, several thought that the crime of rape is committed by violating a woman when she is in a state of insensibility and has no power over her will, whether such state is caused by the man or not, the accused knowing at that time that she is in that state; and Tindal, C. J., and Parke, B., remarked that in stat. Westminster, 2, c. 34, the offence of rape is described to be ravishing a woman where she did not consent, and not ravishing against her will. But all the ten judges agreed, that in this case where the prosecutrix was made insensible by the act of the prisoner, and that an unlawful act, and where also the prisoner must have known that the act was against her consent at the last moment that she was capable of exercising her will, because he had attempted to procure her consent and failed, the offence of rape was committed.”

(e) This is incorrect (see *Neville's case*, 1 Den. C. C. 36; *Reg. v. Button*, 18 L. J. 19, M. C.)

must be acquitted. Therefore he treats her as competent to consent, and her consent as a ground of acquittal; but then, that direction is qualified by what he adds afterwards,—that if they were satisfied that she was ignorant of the nature of the act, and made no resistance solely from a *bonâ fide* belief that the defendant was, as he represented, treating her medically with a view to her cure, his conduct amounted to an assault. That is the part which is objected to. The jury found the prisoner guilty. The girl was of an age at which she might be totally ignorant of the nature of the act, morally or religiously, and of the effect which it might have upon her character and station in life; and she was sent by her parents to the defendant to be medically treated by him. It is said that he may have treated her medically; if so, can it be said that he did not commit both a legal and ecclesiastical offence? but the jury must, I think, be taken to have found that it was not medical treatment. I admit that the question was not put to them; nor was it necessary, because, whether the defendant thought it would be beneficial or not, his act was altogether improper and unjustifiable. He was guilty of a great offence. He in truth disarms the girl; and she submits under a misrepresentation that it was some act necessary and proper for her cure; she made no resistance to an act which she supposed to be quite different from what it was: what she consented to was something wholly different from that which was done, and, therefore, that which was done, was done without her consent. I am not prepared to say that the two cases referred to might not be cases of rape; for every rape includes an assault; but it is not necessary to decide that question now.

REG.  
v.  
WILLIAM CASE.

Assault—  
Consent—  
Fraud.

Judgment.

ALDERSON, B.—This is quite undistinguishable from the two cases decided by myself and my brother Gurney, which were only the sequel of many others previously decided. When a man obtains possession of the person of a woman by fraud, it is against her will; and if the question were *res nova*, I should be disposed to say that this was a rape, but that is not necessary in this case. This is an indictment for an assault, and the prisoner obtains the consent of the child by representing the act as something different from what it was.

PATTESON, J.—Mr. Horn confounds active consent and passive non-resistance, which, I think, the learned recorder has very accurately distinguished. Here the girl did not resist; but still there was no consent.

COLERIDGE, J.—The girl was under medical treatment, and she makes no resistance only in consequence of the confidence which she reposed in the defendant as her medical adviser. If there had been no consent the defendant's act would have been indisputably an assault; and under the circumstance, therefore, his conduct amounted to an assault according to cases which I should be sorry to see infringed.

PLATT, B.—I think my brother Patteson has pointed out the fallacy of Mr. Horn's argument as to consent. The girl consents

REG. v. WILLIAM CASE. to one thing, and the defendant does another; that other involving an assault.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*June 1, 1850.*

(Before WILDE, C. J., ALDERSON, B., PATTESON, J.,  
COLERIDGE, J., and PLATT, B.)

REG. v. HAWKINS.(a)

### *Larceny or Embezzlement.*

*If a servant receives from his master goods for the purpose of selling them, and he appropriates them to his own use, he is guilty of larceny, not embezzlement.*

CASE.

THE following case was reserved by the Recorder of Saltash:—  
The prisoner was indicted at the last adjourned Epiphany General Quarter Sessions, held for the borough of Saltash, in the county of Cornwall.

At the trial it appeared that the prisoner had been a clerk of the prosecutor, who was a navy and army tailor, living at Portsmouth, and it was part of his duty to go on board ship, and take orders for and sell clothes to the marine artillery on account of his master. A short time before the prosecution, the prisoner had been thus employed on board the "Terrible" at Portsmouth, which ship being ordered round to Plymouth, the prisoner obtained a passage and came round in her, being first entrusted by his master with a quantity of soldiers' clothes, and 10*l.* in silver, to enable him to give change to customers.

Whilst at Plymouth, he wrote to his master the letter, which is annexed, marked "A," that he could do business with the marines of the "Gladiator," a ship lying there, and upon this received a further supply of goods. Not having made any remittance, and having stayed away much longer than was reasonable, the prosecutor became uneasy, and sent to Plymouth, when it was found the prisoner had entered as a seaman in the "Gladiator," and had sailed in her for the coast of Africa; previous to the vessel sailing, he wrote to his master the letter marked "C," saying he would get all his accounts made up, and remit

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

the money due from Madeira (through Mr. Steele, the Lieutenant of Marines), at which place the "Gladiator" was likely to touch; but it appeared at the trial by the evidence of Lieut. Steele, that he had never mentioned the subject to him. The "Gladiator" was driven back to Plymouth by stress of weather on the same day as prosecutor's assistant arrived, and the prisoner was immediately apprehended; but neither before nor at the time was he asked for any account, nor did it appear he had ever refused to account, except by going to sea, as above stated, which, it was contended for the prosecution, amounted to a refusal. There was no endeavour to show that the prisoner had received any money from any persons to whom he had sold the goods of his master, except the paper annexed, marked "D," which was found in his possession, but all such goods as he had been supplied with were gone, except a few, of which the handkerchiefs and other articles mentioned in the indictment were a part, and these goods were found in the prisoner's berth on board the "Gladiator."

REG.  
v.  
HAWKINS.  
—  
*Larceny or  
embezzlement.*

Upon these facts it was contended on the part of the prisoner, <sup>Case.</sup> that inasmuch as he had received these goods from his master, and not from any other person on his account, and also had not refused to account, he could not be charged with an embezzlement of them under the statute. For the prosecution it was contended, that there was some evidence to go to the jury as to the embezzlement both of money and goods; but beyond all question that it was quite clear that the jury must find the prisoner guilty under the count for simple larceny. These questions were fully argued before the recorder summed up; but he directed the jury that inasmuch as there was no evidence of receipt of any money for goods, and no demand or refusal to account, the jury must acquit the prisoner of any embezzlement of money, and did not make any comment whatever on the count for simple larceny, leaving it simply to the jury to say whether there was or was not any embezzlement of goods, and upon this, after being locked up for many hours, the jury gave a verdict of guilty on the first count; and on the application of prisoner's counsel, the judgment was respited, and the prisoner, for want of sufficient sureties, was committed. The opinion of the judges is now therefore respectfully requested as to whether the prisoners were rightly convicted.

*E. W. Cox* for the prisoner.—The conviction for embezzlement cannot be sustained.

*PATTESON, J.*—I do not see how the offence of the prisoner can be treated as embezzlement; it is larceny.

*Collier*, for the prosecution, was then called upon.—It was held <sup>Argument for  
the crown.</sup> in *Whittingham's case* (2 Leach, 912; 2 Russ. on Crimes, 179), that if a servant received money, either from the master or from a third person, on the master's account, it was sufficient to bring the case within the repealed stat. 39 Geo. 3, c. 85; and if the court considers that decision correct, this conviction might stand. In a later case, however, of *R. v. Murray* (1 Moo. Cr. Cas. 276), it was decided, that if the property embezzled has been in the possession



REG.  
v.  
HAWKINS.  
—  
*Larceny or  
embezzlement*

of the master, or any of his other servants, the case is not within the 7 & 8 Geo. 4, c. 29, s. 47. In that case the prisoner was the clerk of A., and received from another clerk money belonging to A., for the purpose of paying for an advertisement: he paid 10s., and charged 20s. for the advertisement, fraudulently converting the difference to his own use. The judges thought that the prisoner was not guilty of embezzlement, because A. had possession of the money by the hands of his other clerk. But that case has received some qualification from the decision in *R. v. Orlando Masters* (1 Den. C. C. 332; 3 Cox Crim. Cas. 178), where it was held, that a clerk who received money from a fellow clerk in the due course of its transmission from the customer to the master, and fraudulently appropriated it to his own use, was guilty of embezzlement. The only distinction between the cases seems to be, that in the one case the money would go directly to the master, in the other through the hands of another servant.

Judgment.

WILDE, C. J.—The distinction between the cases cited is clear and sensible. The statute was passed to provide for the case of servants receiving money from third persons for their masters, and for which they are accountable to their masters; and if the property has been in the master's possession, they do not so receive it. In the last case the servant was entrusted with the money for the purpose of delivering it to the master; in the former he was not. The cases, therefore, are all adverse to a conviction in this case. The prisoner received the goods from his master not for the purpose of accounting for them, but in order to sell them and account for the proceeds. That was not a receipt under circumstances which makes the appropriation of the goods embezzlement; and there is nothing in *R. v. Murray* inconsistent with the previous cases. The offence of the prisoner was larceny, and not embezzlement.

The other judges concurred.

*Conviction reversed.*

## COURT OF CRIMINAL APPEAL.

June 1, 1850.

(Before WILDE, C. J., ALDERSON, B., PATTESON, J.,  
COLERIDGE, J., and PLATT, B.)

REG. v. COULSON AND ANOTHER. (a)

*False pretences—Indictment.*

*Where a written instrument is employed as a part of the false pretence, whereby money or goods are fraudulently obtained, it is not necessary to set out the instrument in the indictment, unless some legal description is given to it, the accuracy of which it may be material for the court to decide:*

*Held, therefore, that an indictment, which simply alleged that the defendant falsely pretended that a certain printed paper, which he then produced, was a good and valid promissory note, was sufficient without setting out the printed paper.*

**T**HE prisoners were tried at the last Lincolnshire Sessions, when the following case was reserved:—

At a General Quarter Sessions of the Peace holden at Louth, in and for the parts of Lindsey, in the county of Lincoln, on Tuesday the 10th day of April, 1850, Henry Coulson and John Rusting, were tried and convicted upon an indictment for obtaining money and goods under false pretences, of which indictment the following is a copy:—

*Lincolnshire, Lindsey, to wit.*—The jurors for our Lady the Queen upon their oath present, that Henry Coulson, late of the parish of Market Rasen, in the parts of Lindsey, in the county of Lincoln, labourer, and John Rusting, late of the same place, labourer, on the eighth day of January, in the thirteenth year of the reign of our Sovereign Lady Victoria, at the parish of Market Rasen aforesaid, in the parts and county aforesaid, unlawfully did falsely pretend to one John Bratley that a certain printed paper, then and there produced by him the said Henry Coulson, and by him offered and given to the said John Bratley in payment for certain pigs before them agreed to be sold by the said John Bratley to the said Henry Coulson, was a good and valid promissory note for the payment of five pounds, by means of which said false pretence the said Henry Coulson and John Rusting did then and there unlawfully obtain Case.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

REG.  
v.  
COULSON.  
—  
*False pretences*  
—*Indictment.*

from the said John Bratley five pigs, of the value of three pounds seventeen shillings and sixpence, and one piece of the current gold coin of this realm, called a sovereign, of the value of twenty shillings, one piece of the current silver coin of this realm called a half-crown, of the value of two shillings and sixpence, and five pieces of the current copper coin called pennies of the value of fivepence, of the moneys, goods and chattels of the said John Bratley, with intent then and there to cheat and defraud him the said John Bratley of the same. Whereas in truth and in fact the said printed paper was not a good and valid promissory note for the payment of the sum of five pounds, or for the payment of any sum whatever to the great damage and deception of the said John Bratley, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Case.

It was proved at the trial, that the prisoners acted in concert, and that Coulson offered to the prosecutor in payment of three pounds seventeen shillings and sixpence, for certain pigs agreed to be sold by him to the prisoner, Coulson, the printed paper hereunto annexed, which is commonly called a flash note, and contained the words and figures following, disposed and arranged so as to have the appearance of a Bank of England note.

"5l. Bank of Elegance. No. 230.

"I promise to pay on demand the sum of five pounds, if I do not sell articles cheaper than any body else in the whole universe.

"January 1st, 1850.

For MYSELF & Co.

"M. CARROLL,

"FIVE.

"56, Allison-street, Birmingham."

The prosecutor said to Coulson, who tendered the note, "I think it is not a good one." Rusting took the note, and examined it, and said, "It is a five pound Bank of England note, and will go anywhere." Prosecutor then took the note, and gave Coulson the change, 1l. 2s. 6d., and delivered up the pigs, which he assisted the prisoners in driving part of the way. The prosecutor said he could only read very badly, and being requested in court to read the note, said he could not read at all.

The Court of Quarter Sessions, before which the prisoners were tried, had reserved the following questions for the opinion of the judges at the request of the prisoner's counsel.

First, whether the act of putting off the printed paper in question as a five pound Bank of England note in payment for goods amounts to a false pretence within the statute?

Secondly, whether the printed paper should have been set out more fully in the indictment?

Argument for  
prisoner.

*Willmore*, for the prisoners.—The first question submitted to the court must be answered in the negative. The mere act of putting off the paper as a bank-note cannot be a false pretence within the statute; because it is consistent with the mere uttering of it that

the prisoner had no knowledge that it was not genuine; and the indictment omits the word "knowingly."

ALDERSON, B.—Then you say it is consistent with the indictment that the prisoner was as innocent as the prosecutor would have been if he had passed it.

COLERIDGE, J.—No question is reserved as to the indictment; the question refers only to the evidence, and I understand it to mean, whether the transaction as stated in the case amounts to a false pretence within the statute.

ALDERSON, B.—I see that the statute itself does not use the word "knowingly." The indictment follows the statute.

Willmore.—That was mentioned in *R. v. Bowen* (19 L. J. 65, M. C.; 3 Cox C. C. 483), where the Court of Queen's Bench refused to arrest the judgment, on the ground that that word was omitted; but that case is distinguishable in this respect—that there the false statement related to a matter which was necessarily within the knowledge of the party making it.

PLATT, B.—The allegation that the false statement is made with intent to cheat and defraud merely involves the *scienter*.

Willmore.—Upon the evidence it is not clear that both the prisoners knew the note to be bad; and at all events, their statement is rather a misdescription of an instrument than a false statement of any alleged existing fact; and is therefore not within the statute.

COLERIDGE, J.—The two prisoners acted in concert, and whatever is proved against one is proved against the other. Surely there can be no doubt that this is within the statute.

Willmore.—Then, secondly, the printed paper ought to have been set out more fully in the indictment. Its purport at least ought to have been stated: (*R. v. Wickham*, 10 Ad. & Ell. 34; *R. v. Phillpots*, 1 Car. & Kir. 112.)

ALDERSON, B.—Why is it at all material to set it out? It is alleged that they falsely pretended that the paper, whatever it was, was a good promissory note. My brothers Cresswell, Williams, and myself have very recently held, that it was not necessary to set out the parts of Russian Bank notes upon an indictment for forgery, the parts being by themselves quite intelligible: (*R. v. Faderman*, Central Cr. Ct., May, 1850.)

Willmore.—The case of forgery is provided for by an express statutory enactment. The rule of pleading is that the false token or instrument should be set out: (1 Stark. Cr. Pl. 24; *R. v. Munoz*, 2 Stra. 1127.)

PATTESON, J.—*R. v. Wickham* is a very different case; because there the false pretence was that a certain promissory note was a good and valuable security.

WILDE, C. J.—The judgment of Patteson, J., in that case, shows clearly that it does not decide that the instrument must be set out.

Willmore.—The argument explains the judgment; and the ground is that as the promissory note was not set out, it might have been the prisoner's own promissory note.

REG.  
v.  
COULSON.  
—  
False pretences  
—Indictment.

REG.  
v.  
COULSON.  
—  
*False pretences*  
—*Indictment.*

ALDERSON, B.—That argument is used to show that there is no sufficient averment of a false pretence.

PLATT, B.—What reason is there for setting out? A forged bank note, as set out in the indictment, would appear to be genuine.

*Willmore.*—It is not unnecessary in all cases because it would be useless in some. If it would assist the court in any case, that is a sufficient reason for the rule. In substance this case is not distinguishable from *R. v. Wickham*.

WILDE, C. J.—It clearly is. In that case the indictment did not enable the court to come to a satisfactory conclusion that the case was brought within the statute, because there the indictment alleged that the prisoner produced a promissory note, and represented it to be a valuable security. There, a well known legal description was given to the instrument; and by setting it out the court would have been able to form a judgment whether it answered that description. Here, there is no statement that it was a promissory note, or anything but a printed paper.

ALDERSON, B.—It may be material in cases of forgery to set out the instrument that the court may see whether it is an instrument of which forgery can be committed.

*Boden*, for the prosecution, was not called upon.

WILDE, C. J.—We have already disposed of the first question, and we all think the second equally clear. The court could derive no assistance whatever from setting out this instrument. The allegation is that a certain paper writing, which may have contained hieroglyphics, was produced and represented to be a good note; and that it was not a good note. Here, nothing turns upon the contents of the paper; and therefore it need not be set out.

ALDERSON, B.—The printed paper may have contained the first verse of Chevy Chase. When the instrument is stated to be something of which the description is material, then it is necessary to set it out, not otherwise.

PATTESON, J.—*R. v. Wickham* was very different from this case.

The other judges concurring,

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

January 19, 1850.

(Before WILDE, C. J.; ALDERSON, B.; WIGHTMAN, J.;  
CRESSWELL, J.; and ERLE, J.)

REG. v. BOND.(a)

*Larceny—Indictment—Evidence—Prisoner's statement—Practice—*  
11 & 12 Vict. c. 42, s. 18.

*An indictment charged a prisoner with stealing several pieces of the current coin of the realm, and named all those coins in general circulation. The jury found him guilty of stealing some of the coins mentioned in the indictment, but they could not say which.*

*Held that a conviction could not be sustained. Per. Wilde, C. J., Alderson, B., Wightman, J., and Cresswell, J.; Erle, J., dissentiente.*

*A prisoner, when before the magistrate on his first examination, was addressed by him in the language of the earlier part of the 18th section of the 11 & 12 Vict. c. 42, but the caution contained in the proviso was not given, and the prisoner made a statement which was taken down but not signed by either him or the magistrate. On his second examination, after a few additional questions had been put to some of the witnesses, and their depositions had been read over, the prisoner was addressed by the magistrate as before, and he then declined saying any thing.*

*Held, that his former statement was admissible.*

*Semle, per Alderson, B., that the proviso in the 18th section of 11 & 12 Vict. c. 42, is merely meant to apply where there has been some promise or threat held out to the prisoner which would have rendered his statement inadmissible against him; and that the effect of giving him that caution, is to render such statement evidence notwithstanding such promise or threat.*

THE prisoner was tried at the December Session of the Central Criminal Court, before Mr. Justice Cresswell, by whom the following case was reserved.

CASE.

First, the indictment charged the prisoner with stealing seventy pieces of the current coin of the realm, called sovereigns, of the value of 70*l.*; 140 pieces of the current coin, called half-sovereigns, of the value of 70*l.*; and, in like manner, 280 crowns, 400 half-crowns, 400 florins, 400 shillings, and 400 sixpences, the property of I. G. Currie & Co., in their dwelling-house.

Secondly. In another count he was charged as clerk and servant.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

REG. v. BOND.

Larceny—  
 Indictment—  
 Evidence—  
 Practice.

The prisoner was a clerk in the banking-house of Isaac G. Currie & Co., and on the 17th of October was employed as one of the cashiers. There was evidence from which it might be inferred that he had on that day abstracted 70*l*. in money from the bank, but there was no evidence to show the nature of any one piece of the coin taken.

Amongst other evidence the counsel for the prosecution tendered in evidence a statement by the prisoner before the committing magistrate, made under the following circumstances:—

The prisoner was taken before the magistrate on the 20th of October, and charged with stealing 70*l*. in money from his employers, and remanded after some witnesses had been examined. He was brought up a second time on the 24th of October, and then further evidence was given, and that which had been given on the former occasion was read over. The magistrate then addressed him in the language prescribed by the 11 & 12 Vict. c. 42, s. 18, but did not tell him, as required by the proviso, that he had nothing to hope from any promise of favour, or to fear from any threat.

The prisoner's answer was taken down. The solicitor for the prosecution then asked for another remand, as the next day would be the last on which he could go before the grand jury at the sessions which were then in progress, for which he could not be prepared.

Case.

The prisoner objected, and assigned a reason, and being asked whether he wished that to be taken down as part of his statement, he said that he did, and it was accordingly written down. He was then remanded, and the statement was not signed by the prisoner or the magistrate. The prisoner was brought before the magistrate again on the 31st of October. No new witnesses were examined, nor any questions put for the prosecution; but an attorney, by whom the prisoner was then attended, put a few questions to one of the witnesses who had been before examined. The evidence was then read over, and the witnesses were then resworn. The statement made by the prisoner at the former examination was then read to him; his attorney objected to its being taken as his statement, because an addition had been made to the evidence in answer to his questions. The magistrate then again asked the prisoner in the terms prescribed by the statute, whether he wished to make any statement, and he declined doing so.

The prisoner's counsel objected to the former statement being received, but I admitted it, reserving for the consideration of the judges the propriety of so doing.

It was then read by the clerk, who took it down, as follows:—  
 "I shall say nothing here. I had rather say it at my trial."  
 And when a remand had been asked for he objected to it, and said,  
 "it is my intention to plead guilty to the charge."

At the close of the case for the prosecution it was objected that there was no evidence to show that the prisoner had taken any particular description of coin, and that the jury could not, with propriety, find him guilty of stealing either one or the

other in the alternative. In order that this question might be considered by the judges, I told the jury, that if they were satisfied that the prisoner had stolen a sum of money from his employers in their banking-house, consisting of some of the coins mentioned in the indictment, although they could not say which, they should find him guilty.

The jury found him guilty, and I have now to request the opinion of the judges, first, whether the statement made by the prisoner was properly received; and, secondly, whether the direction given to the jury was correct.

C. CRESSWELL.

*Parry* (for the prisoner) would argue the latter question first. The evidence did not support the indictment, for there was nothing to show what specific money was stolen. It was always necessary that articles alleged to have been stolen should be accurately and particularly described, and that the proof should correspond with the allegation. This was shown conclusively by the 7 & 8 Geo. 4, c. 29, s. 48, which renders it, in cases of embezzlement, unnecessary to specify any particular coin. The exception establishes the rule. That rule, as laid down by 1 Russell on Crimes, 107, was, that the articles should be described with such certainty as would enable a jury to decide whether the chattel proved to have been stolen was the very same with that upon which the indictment was framed, as would show judicially to the court that it could be the subject matter of the offence charged, and as would enable the defendant to plead his acquittal or conviction to a subsequent indictment relating to the same chattel. In 2 Hale, 183, it was said, "Where several things are stolen, it is necessary to state the number; therefore, it is not sufficient to say, *felonice furatus est aves et columbas* out of a dove-cote, or young hawks out of a nest, without specifying the number. Nor that the prisoner stole twenty sheep and lambs, because it did not appear how many of the one sort or how many of the other."

ERLE, J.—But, suppose he is alleged to have stolen ten hawks, and he steals nine, he must be convicted. It may be necessary to state number, but it need not be proved as laid.

ALDERSON, B.—You must charge a specific offence. To say he stole doves, would be merely to say he was a dove stealer.

*Parry*.—In *R. v. Fry* (R. & R. 482), the indictment alleged that the prisoner stole 10*l.* in moneys numbered, and it was held insufficient. Some of the pieces of which that money consisted should have been specified, and should also have been proved. So in *R. v. Forsyth* (R. & R. 274), an indictment, which charged the stealing of 100 articles of household furniture, was held bad.

ALDERSON, B.—The counsel for the prosecution will say that the jury have found the prisoner guilty of stealing something mentioned in this count.

WILDE, C. J.—How are the jury to say "not guilty" upon this count generally, when they are quite clear he stole something that is contained in it?

ALDERSON, B.—But the question is, can the prisoner be found

REG. v. BOND.

Larceny—  
Indictment—  
Evidence—  
Practice.



Rsg. v. BORD.

Larceny—  
Indictment—  
Evidence—  
Practice.

guilty of stealing part unless the jury can say which part, and they have virtually said they cannot?

*Parry.*—Suppose the indictment charged a man with stealing a cow and a horse. The prosecutor had lost both, and it was clear that the prisoner had stolen one, but the jury could not say which.

CRESSWELL, J.—Or suppose that a draper's shop had been broken into, and property stolen. The prosecutor could swear that previously there were either six coats and five pairs of breeches, or five coats and six pairs of breeches, he could not tell which. Subsequently there are but five of each, and it is clear that either a coat or a pair of breeches has been stolen. Could there be a conviction under such circumstances?

ERLE, J.—It is surely the same crime whether he steals one or the other.

CRESSWELL, J.—But the jury might find him guilty upon that part of the indictment on which he was really innocent.

ERLE, J.—They might find him guilty of the larceny mentioned in the indictment.

*Parry.*—But the charge is not merely that the prisoner stole but that he stole certain coins, and there is no specific proof of that precise allegation.

ALDERSON, B.—There is a count in murder on record, which alleged that two blows were given by the prisoner, and that if the deceased did not die of the first he died of the second, and if not of the second, of the first.

CRESSWELL, J.—In that case there might be proof that he committed both acts, the only doubt being as to which caused the death.

*Parry.*—In *R. v. Kettle* (3 Chit. Crim. Law), the prisoner was indicted for stealing one bushel of oats, one bushel of chaff, and one bushel of beans. The evidence was that they were all mixed together when stolen, and it was held not to support the indictment. It should have been described as a certain mixture, consisting of one bushel of oats, &c.

ALDERSON, B.—I doubt the propriety of that decision. I cannot help thinking that, if a man steals wine and water, he may be charged with stealing wine. The above principle would doubtless hold good, where the mixture was such as to produce a chemical change in the articles.

*Parry.*—Suppose two men are charged with murder, and it is uncertain which of them is guilty, although one of them is clearly so. Such a case really occurred at Maidstone, and three persons were acquitted of murder, although it was pretty evident that one was guilty.

ALDERSON, B.—In such a case there could be no doubt about the propriety of an acquittal. If one man is innocent a verdict against all would be palpably wrong. Here the prisoner is confessedly guilty of something which the indictment contains.

*Parry.*—How could the prisoner plead *autrefois acquit* or convict to a second indictment for the same offence, supposing the jury had returned such a verdict as this?

ALDERSON, B.—Where would be the difficulty of pleading *autrefois acquit*? He has been in jeopardy with regard to all that the indictment contains.

ERLE, J.—Or *autrefois convict*, for the stealing is one act, and of that he has been convicted.

Parry.—But the second jury could not say he has been guilty of stealing any one specific thing.

WILLIAMS, J.—The jury would have to say whether it was the same specific offence, and that would be the subject of parol evidence. The prisoner would not be confined to the record alone. Suppose the goods are charged in the first indictment to be the property of a person unknown, parol evidence must then be adduced to show that they are the same goods as are mentioned in the second indictment.

Parry.—Suppose this conviction were held good, and the prisoner should be afterwards indicted for stealing one of these sovereigns, how could he plead *autrefois convict* when, by the very terms of the verdict, the jury have never said that he was guilty of stealing sovereigns? If he could plead *autrefois acquit*, or *autrefois convict*, in the alternative, the difficulty might be got over, but this of course he could not do.

ERLE, J.—But surely what may be the particular chattel stolen has nothing to do with the offence. The stealing is what he is charged with. Suppose a man steals a coat, and in the pocket of it there is a pocket-book. If he is indicted for stealing the coat and convicted, could he not afterwards, if he were indicted for stealing the pocket-book, plead *autrefois convict*; the stealing was one act; of that he had been convicted, and surely he could not be punished a second time for the same act of stealing.

Parry.—It is difficult to see how he could plead *autrefois acquit* unless the pocket-book was included in the first indictment. Perhaps the difficulty in this case might have been obviated by stating the coins to have been certain pieces of the current coin of the realm to the jurors unknown; but there is no such allegation. Secondly. As to the first point mentioned in the case. The statement made by the prisoner was improperly received in evidence, the caution required by the 11 & 12 Vict. c. 42, s. 18, not having been given. It was the duty of the magistrate to state, in the terms of this proviso, that the prisoner had nothing to hope or fear from any promise or threat. The proviso overrides the whole section.

ALDERSON, B.—It is very difficult to understand what the Legislature really meant, but may it not be this—that the second proviso is merely meant to apply where there has been some promise or threat held out to the prisoner, which would render his statement inadmissible against him? But that the effect of giving him this caution is to render his statement evidence notwithstanding such promise or threat.

Parry.—When the prisoner is under charge, the magistrate is supposed to return all that he says. Any evidence of a statement

REG. v. BOND.

—  
Larceny—  
Indictment—  
Evidence—  
Practice.

REG. v. BOND.

Larceny—  
Indictment—  
Evidence—  
Practice.

by him not in the deposition would not be received. Here the statement in question is not returned with the deposition. In *R. v. Walter* (7 C. & P. 267), the prosecutor stated that the prisoner, while under examination before the magistrate, made a confession of his guilt, and was about to state what that confession was, but, on referring to the depositions returned, it appeared that the prisoner was there stated to have said: "I decline to say anything." Lord Abinger was of opinion that the prosecutor's statement could not be received.

ALDERSON, B.—Here it was taken down before the magistrate. Parry.—Yes, but not returned.

ALDERSON, B.—At all events there is no return inconsistent with it, as there was in *R. v. Walter*. You may not be entitled to contradict a magistrate's statement, but it does not follow that you may not give in evidence anything additional that is consistent with it.

Parry.—Here the case states that the prisoner, when asked whether he wished to make any statement, declined doing so. So in *R. v. Morse* (8 C. & P. 605), Patteson, J. said, in a case where three persons were examined at the same time, on the same charge, and each of the prisoners made a statement, but the clerk had left a blank where either of the prisoners mentioned one of the others, "I think I ought not to receive parol evidence. I think that the rule ought not to be extended. In the present case the statement professes to be a complete account of what took place, and I am of opinion that supplementary evidence ought not to be received."

ALDERSON, B.—In that case of what use would the evidence have been if it had been admitted. It would merely have furnished the names of persons against whom the statement would not have been evidence at all.

Parry.—In *R. v. Moore* (Matth. Digest, 257), it was held that an incidental observation made by the prisoner, in the course of his examination before the magistrate, but which did not form a part of the judicial inquiry, so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, might be given in evidence against him at the trial. *R. v. Spelsbury* (7 C. & P. 187) was to the same effect, but here the matter was most material to the issue, and it was clearly the duty of the magistrate to take it down and return it. In *R. v. Carpenter* (2 Cox Crim. Cas. 229), it was held, that such an observation not taken down by the magistrate was not admissible if it related to any matter which formed part of the judicial inquiry then being conducted before the magistrate; and to the same effect is *R. v. Weller* (2 C. & K. 223.)

*Huddleston* for the prosecution.—As to the first point: the right construction of the new statute, looking to the proviso, is this: if there is any evidence that at a previous time any threat or promise has been made to the prisoner, then its effect must be removed from his mind by the caution from the magistrate, and if after that he makes any statement, it is admissible against him; but unless there

has been some such previous threat or promise, the second caution need not be given at all: this construction is sustained by the very wording of the proviso;—"the justices shall give him clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him." But that is not, after all, the question; this is an observation of an interlocutory character, and admissible without reference to the statute.

REG. v. BOND.

Larceny—  
Indictment—  
Evidence—  
Practice.

CRESSWELL, J.—There is one point here which it is necessary to consider. The statement was made by the prisoner for the purpose of its being taken down, because, when asked, he expressly said that he wished it to be taken as part of his statement. It is taken down, but it is not returned by the magistrate with the depositions. Can it then be given from any other source?

Huddleston.—That point does not appear to be raised by the case. There is no reason why it should be returned by the magistrate, because, when the depositions were completed at the last examination, the prisoner repudiates this observation; but surely he cannot get rid of the admission already made. A man might be charged with murder, and in the midst of his examination might choose to say, "I am guilty." Ought the magistrate to say, "Wait until I have read to you the proviso in the act of Parliament and then I will hear you." The prisoner, on reflection, might refuse to repeat his statement, but could it be contended that it would not be evidence? The magistrate is merely required to take down what the prisoner says in answer to the charge, at the end of the proceedings. Now the statement here was not so made. It was in reply to an application for a remand.

WILDE, C. J.—Can it be necessary to give as many cautions as times the prisoner chooses to open his mouth?

Huddleston.—The proviso at the end shows that the act did not mean to interfere with any rule by which the statements of the prisoner were admissible before the statute. *R. v. Harris* (R. & M. C. C. 338), shows that parol evidence may be given to add to the written examination of the prisoner taken by the magistrate. That was a case in which three prisoners were charged with sheep-stealing. One of them made a statement with regard to a Mr. Bennett's sheep, and another statement with regard to a Mr. Pennell's. The latter was taken down by the magistrate but not the former, and yet evidence of the former was allowed to be given upon the trial for stealing the sheep of Pennell.

ALDERSON, B.—Yes, but there the inquiry before the magistrate was as to Pennell's sheep, and it could not be necessary for the magistrate to take down any thing that was said about Bennett's, and if it was not his duty to take it down, then its absence is accounted for, and it might be supplied.

Huddleston.—There was no such separation of the cases before the magistrate: they were all investigated together.

ALDERSON, B.—I have my note of what took place upon the argument of *R. v. Harris*, and it is clear from that that there

REG. v. BOND. were separate informations as to Bennett's, Pennell's and Price's prosecutions.

Larceny—  
Indictment—  
Evidence—  
Practice.

*Huddleston*.—At any rate the prisoners were not called upon to make any statement until all the depositions in all the cases had been taken. In *Rowland v. Ashby* (R. & M. 231), Best, C. J. says, "My opinion is, that upon clear and satisfactory evidence it would be admissible to prove something said by the prisoner beyond what was taken down by the magistrate. *Leach v. Simpson* (5 M. & W. 309), and *Venafrá v. Johnson* (1 M. & R. 316) are also in point. In *R. v. Wilkinson* (8 C. & P. 662), the indictment was for forging an acquittance. It appeared that there were two examinations before the magistrate,—one on the 10th of November, when the prisoner made a statement; the second on the 14th of November, when the depositions were completed, and the prisoner then said in answer to a question whether he had anything to say, "I decline saying anything." That was returned, but the statement made on the former day was not, but it was held to be admissible, and Parke, B. says, "let the effect of the evidence be what it may with the jury, it is clearly admissible. What a prisoner says against himself is evidence whether the officer was right or wrong in not returning the statement, or furnishing a copy of it to the prisoner." There it seemed to be thought that although the magistrate had not done his duty, it did not prevent the statement being receivable. This would appear to overrule the case of *R. v. Walter*, for the former observation was as much contradicted by the latter as in that case. The words in the latter part of the section show that the magistrate may act precisely as he did before. The Legislature seems to say, "You may avail yourself of this act of Parliament or not," with certain exceptions which do not apply here, so that the ruling on cases before the act may be taken to decide this case, and this being a mere interlocutory observation, *R. v. Spilshury* (7 C. & P. 187), shows that it is evidence. There, Coleridge, J. says, "at the close of the case for the prosecution the prisoner is asked if he wishes to say anything, and if he does it is taken down, and the evidence of that statement is the written examination; but, if the prisoner says something while the witnesses are under examination that does not stand on the same ground." Even if this statement is made irregularly and taken informally, *R. v. Reed* (M. & M. 403), and *R. v. Pressly*, (6 C. & P. 183), show that it may be received.

Depositions.

ALDERSON, B.—Whether the meaning of the second proviso is such as has been suggested or not, I have no doubt that when a previous threat has been used, the reading of that proviso will render admissible any statement that was made subsequently to it. But may not this view be taken of the act,—that it is under no circumstances more than directory, and that, if not resorted to, the deposition may still be proved as before? The act makes the handwriting of the magistrate conclusive, if its terms are complied with.

*Huddleston*.—And, if not complied with, the same formalities

as were before required must be gone through. The form of the schedule gives strength to the interpretation thus put upon the 18th section, for in giving the caution that is to be used, all allusion to the second proviso is omitted.

REG. v. BOND.

—  
Larceny—  
Indictment—  
Evidence—  
Practice.

As to the second point: No doubt, in the indictment it is necessary to state the charge specifically, and the reason assigned is, that the court may see that the goods are the subject matter of larceny. The indictment here, therefore, is perfectly good, and would have been bad if it had charged that the denomination of the coin was to the jurors unknown. But the offence has nothing to do with the particular coin or chattel. The offence is the taking. But, however clear and precise the indictment may be, the evidence sufficient to support it may vary from its terms in several particulars, as in number, amount, &c. Now the jury say here that he is guilty of the charge in the indictment, but they cannot say specifically of which portion of it. Take, for instance, the case put of the coats and the trousers, the jury find him guilty of stealing something, but they cannot say what, but whatever it is, it is in the indictment.

CRESSWELL, J.—It is not the mere taking that is the offence; it is the taking the coat or the trousers; the same might be said in a case of murder where the prisoner was charged with having killed A. and B., and the jury were to say he killed one, but they could not tell which. Murder is the offence there, as stealing is the offence here.

Huddleston.—There is no difficulty if we look to the reason of Indictment. being thus specific in the indictment, namely, to show that the goods alleged to be stolen are the subject of larceny. Then, as to pleading *autrefois convict* there would be no difficulty, for suppose he is again charged with stealing the coat, such a verdict as this would support the plea, if it were proved to be the same taking, for that is the material averment.

CRESSWELL, J.—But, after such a verdict as this, if the prisoner were indicted again for stealing one of the articles, which would you plead, *autrefois convict* or *autrefois acquit*? because either plea would be equally applicable.

Huddleston.—No; *autrefois convict* would be the proper plea; because, if both articles were taken at one time he would have been convicted of such taking.

ERLE, J.—In all cases it would be necessary to adduce parol evidence to show that the goods in the first indictment were the same as those in the second. Why, then, might not parol evidence be admissible to explain that the taking was the same as in the case of the pocket-book before mentioned. Surely, if he were indicted for stealing the pocket-book which was in the pocket of the coat which he had before been convicted of stealing, that would be a defence.

ALDERSON, C.—I think that he might be indicted again. Take the case of the coat and trousers, and suppose that the jury say he is guilty of stealing the coat, and not the trousers; is the taking the same unless it is the taking the same thing? It seems to be

REG. v. BOND.

Larceny—  
 Indictment—  
 Evidence—  
 Practice.

thought there is such a thing as an abstract taking. I do not think so. I think "taking" means taking something.

WILLIAMS, J.—Suppose there had been several counts in the indictment, each count containing a different denomination of coin, could he then have been convicted?

WILDE, C. J.—There the jury could not find him guilty on any one count. They could not say he stole something that any specific count contained.

ALDERSON, B.—You must be prepared to carry your argument the length of saying that an indictment would be good, which said he stole a sovereign, or a half sovereign, or a crown, for that is what the jury have found.

*Huddleston*.—The certainty required in an indictment is very different from what is required in evidence. See to what absurdities the doctrine contended for on the other side would lead. A man may have counted his money a short time before, and knows the amount of it, but does not recollect the specific coin. His servant robs him, and confess the crime generally, but because he does not mention the coin, he escapes with impunity.

ALDERSON, B.—That was the identical case that the Embezzlement Act was intended to provide against, but it omitted to provide for cases of larceny.

Indictment.

*Huddleston*.—In *R. v. Falkner* (R. & R. 481), the prisoner was indicted for stealing sixty pennies, sixty halfpennies, &c. The depositions charged him with robbing the prosecutor of copper money, not saying what, and before the magistrate the prisoner made a statement that he was guilty, and that was proved at the trial. The judges held that the evidence was sufficient to support a conviction.

WILDE, C. J.—There is a very short account of that case; and I think that the inference to be drawn from it is against you. The main point there was as to the sufficiency of the confession, without any further evidence of the robbery, and therefore it is possible that some evidence was adduced to show that the prosecutor had either a penny or a halfpenny, though the fact is not reported. And if such evidence was not given, it seems strange, if there was anything in the point, that it should not have been taken either by the counsel or the court.

*Huddleston*.—Suppose a man were indicted for murder, and there were several counts, each charging a different mode of death, could there be any objection to a general verdict?

ALDERSON, B.—In the case of *R. v. Good*, who was tried for murder, the mode of death was laid in thirty-five different ways, but neither Lord Denman, nor I, ever dreamed that it was not necessary for the jury to say on which count they thought he was guilty.

*Huddleston*.—*R. v. Grove* (R. & M. 447), although a conviction for embezzlement, is in favour of the prosecution in this case.

*Parry* (in reply).—*R. v. Chapman* (1 C. & K. 119), and *R. v. Lloyd Jones* (8 C. & P. 288), would seem to throw some doubt upon the case of *R. v. Grove*, even if it were applicable here. As to the

question respecting the depositions, *Rowland v. Ashby* was the case of a deposition in bankruptcy, which is quite different from a deposition before a magistrate. By the late act, the Legislature seems to have laid down a general rule to be observed in all cases, but whether that is so or not, this evidence on general and acknowledged principles ought not to be received, and Mr. Phillips, in his work on Evidence, p. 83, seems to be clearly of opinion that parol evidence ought not to be admitted under such circumstances as these.

REG. v. BOND.

Larceny—  
Indictment—  
Evidence—  
Practice.

April 27, 1850.

ALDERSON, B., now delivered judgment.—In this case, argued some time ago before the Lord Chief Justice Wilde, my brother Wightman, my brother Erle, my brother Cresswell, and myself, two points were made in the course of the argument, and upon the case reserved. Upon the first point, the court has never entertained any doubt or difference. It was as to the admissibility of a particular part of the examination of the prisoner before the magistrate. (His lordship read that portion of the case in which the point was raised.) The question there was, whether this examination was capable of being read. The court are of opinion that it clearly was, inasmuch as all the necessary ingredients which the modern statute requires had been performed on the first examination, and at the time of the trial it was properly receivable. The evidence of what took place at the second examination does not seem to make any difference at all. The other point is very material, and it is one on which the court has entertained considerable doubt, and upon which we are not altogether unanimous. It was this:—The indictment, as stated, charged the prisoner with stealing certain pieces of gold coin of the realm called sovereigns, of the value of one pound; then it charged him with stealing forty pieces called half sovereigns; five hundred pieces called crowns; five hundred pieces called florins; one hundred pieces called shillings; and two hundred pieces called sixpences; so as to go through, in substance, all the possible denominations of coin which could be well suggested to have been in use at the time. It was clear that the party had stolen a sum of money, but the evidence was uncertain as to whether that which he did steal consisted of a sum having within it a sovereign, or having within it a half sovereign, or having within it any one of the different coins mentioned in the indictment; and as it was clear he had stolen some or one of them, it was so left to the jury by my brother Cresswell, for the purpose of raising the question, he having told the jury that, if they were satisfied the prisoner had stolen a sum of money from the drawer in the banking-house, consisting of some of the coins mentioned in the indictment, though they were unable to state which of the particular species mentioned in the indictment he had stolen, they were to find him guilty; and the question is, whether or not that was a proper direction to give? The majority of the court are of opinion that the direction was *improper*, and that the true rule upon which

Judgment of the  
court.



REG. v. BOND.

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*Larceny—*  
*Indictment—*  
*Evidence—*  
*Practice.*

to act is, that no one can be found guilty of such an offence, unless the jury can definitively find him guilty of stealing some one of the coins mentioned in the indictment. For if that were a good direction, it would lead to this result, that if the jury were to say, we find he stole a sovereign, or a half sovereign, or a crown, or a shilling, or a florin, or a sixpence, but we do not know which, the verdict would be wrong, because, if each coin had been standing separately, the jury must have acquitted him in each particular case, and so, consecutively, have acquitted him of the whole. Therefore, the majority of the court are of opinion that the verdict must be for the prisoner, inasmuch as the jury cannot say that he stole a sovereign, they cannot say he stole a half sovereign, or any one of the other denominations of coins mentioned in the indictment. It is a great misfortune that it should be so. Perhaps it might be right for the Legislature to consider whether it should not be sufficient to state that the party stole a sum of money of the current coin of the realm. But it has not said so, and as the law now is, we must decide that nobody can be found guilty of any larceny where the things stolen are not definitely specified in the indictment and proved by the evidence.

Judgment of  
 Erie, J.,  
 dissents.

ERLE, J.—I regret that on this occasion I have felt it to be my duty to differ from the rest of the court. I was not aware that the judgment would be given this morning, therefore I have not brought down a written judgment, or prepared one; but as the prisoner has been in prison some time, it was thought right that the judgment should be given immediately. It appears to me that the conviction was right. It is clear that the indictment is good upon the face of it, and it is clear, on the evidence, and by the verdict, that the prisoner was guilty of the crime charged in the indictment. The indictment charges him with stealing certain pieces of the current coin of this realm called sovereigns, half sovereigns, crowns, and half-crowns, and the verdict is that he did steal some pieces of the current coin of this realm—some of those that are mentioned in the indictment, but the jury are uncertain which; but it is certain by the verdict that he committed a larceny: whether he is found guilty of stealing all, or he is only found guilty of stealing one, he is guilty of the crime mentioned in the indictment. I have felt it my duty to differ from the rest of the court, because it appears to me, that if the party is entitled to an acquittal on a verdict in this shape, it would be a conceded point in our law that a felony may be committed and that the rules of pleading would prevent the admitted felon being brought to justice. Now, inasmuch as the rules of pleading in criminal and civil courts are wholly subsidiary to the point of bringing the guilty to justice, it seems to me an absurdity to admit that there should be a felony committed, and that the rules of pleading should prevent it from being proved against the party charged with it. I say that, because it seems to me that, if this verdict is not good, neither would the indictment be good which charged the prisoner with stealing some pieces of the current coin of the realm, consisting of sovereigns, half-sovereigns, crowns, florins, shillings and sixpences, but the

jury are unable to say which of them he did steal. If the verdict in that form is wrong, the indictment in that form is wrong; and if no indictment could be framed to bring the felon to justice, the absurdity would be an admitted absurdity. I am of opinion that the rules of pleading are to be understood as subsidiary to the rights of parties, and that this conviction was proper.

REG. v. BOND.

—  
Larceny—  
Indictment—  
Evidence—  
Practice.

ALDERSON, B.—It would be the same if there were several counts, one charging a person with committing a burglary in one way, and one charging him with doing it in another. If the mode were not proved, you could not find him guilty on the first, or the second, and therefore he must be acquitted.

## WESTERN CIRCUIT.

CORNWALL SPRING ASSIZES, 1850.

Bodmin, March 29.

(Before Mr. Justice ERLE.)

REG. v. HENDY. (a)

*Practice—Demurrer—Deposition—Evidence—Threatening letter.*

*In an indictment for felony, the judgment on demurrer is final, and the prisoner is not allowed to plead over.*

*Where the witness had been cross-examined by the attorney for the prisoner, the deposition was allowed to be read in the absence of the witness from illness, although no part of the cross-examination had been taken down, and only such parts of the whole examination as the magistrate's clerk deemed to be material.*

*The prisoner had sent to the prosecutor a letter, the language of which was ambiguous:*

*Held, that the prosecutor might be asked what appeared to him to be the meaning of the letter.*

*Evidence is admissible to show that, under the particular circumstances, the words in such a letter had not their ordinary meaning, but the meaning imputed to them upon the record, and therefore the witness might be asked whether he understood the meaning to be that which the record imputed.*

THE prisoner was indicted for sending to William Thomas a certain letter, directed to the said William Thomas, threatening to burn or destroy the houses, outhouses and other property of him the said William Thomas.

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

REG.  
v.  
HENDY.  
—  
Demurrer—  
Deposition—  
Evidence.

*Moody and Coleridge* for the prosecution.

*Slade and Collier* for the prisoner.

*Slade* was about to demur to the indictment, when

ERLE, J. said, he wished it be known, before he accepted this demurrer, that this subject had received his most particular attention, and his opinion agreed with the opinion of that most eminent judge, the late Chief Justice of the Court of Common Pleas. He considered that the right of the prisoner to plead over after judgment against him in a case of felony was unknown to the law. In cases where the life of a prisoner was at stake, it had no doubt been the practice to allow a prisoner to plead over, but it appeared to him that at all events when this was not the case it was not expedient as a matter of course to allow a prisoner to plead over after the demurrer had been received and decided adversely to him, and therefore, if the demurrer should be persevered with, and he should decide against it, he should sentence the prisoner, leaving him to bring his writ of error. In his opinion the proper course in such cases was to let the facts come before the jury, and should they come to a verdict against the prisoner upon the facts, then he could move in arrest of judgment or bring his writ of error. The desire on the part of the judges is, that in these courts justice should be administered according to the real rights of the parties. Any person demurring must stand or fall by his act.

*Slade* would then withdraw the demurrer, although in his opinion the points were substantial, but still they could be brought forward on a motion in arrest of judgment.

The trial then proceeded.

It was proposed to put in the deposition of a witness who was ill, and in order to do this the magistrate's clerk was called, who stated that he had taken down the examination of the witness when before the magistrate.

This witness was cross-examined, and he then said, he had no doubt that the attorney who attended before the magistrate on behalf of the accused had cross-examined the witness. He had taken down everything the magistrate considered to be material, but he had not taken down anything as cross-examination.

*Slade and Collier* objected to the deposition being read, as there was no cross-examination set forth in it. If there was a cross-examination which was not taken down, the deposition was inadmissible, because it did not come within the intent of the statute.

ERLE, J. said, he was of opinion that the requisites of the statute had been complied with—he had no discretion but to see that those preliminary requisites had been established, and that the witness was examined before the justices in the presence of the accused party; that it had been taken down in writing; that the accused party had an opportunity of cross-examination, and that after that examination had been taken down the matter was read over in the presence of the accused, and signed by the justices. All those requisites had been established upon the present occasion. The witness was examined in the presence of the accused and the legal adviser of the accused, and they had full opportunity to cross-

examine. The examination had been taken down and signed by the justice, and it had been proved that the witness was too ill to attend. He did not think it the duty of the justice to take down every word, for then it would be necessary to conduct the case by question and answer. The law, by way of caution, had directed that the examination should be read over to the accused, and the magistrate was to certify that it had been done.

The deposition was then read, which went to prove that the letter had been put into the post. The following is the letter:—

“Sir,—This is to inform you that you are better not let your farm to any of your family; if you do you will suffer as before. You know how felt the other day.

“A CAUTION FRIEND.”

It was proposed to ask the prosecutor what he considered was the meaning of the letter.

*Slade* objected to the question. Much might depend on the temperament of the party—whether he was a courageous or timid person.

*ERLE, J.* said, it appeared to him that the answer to the question was admissible. The offence intended by the statute was a threat to burn the premises, and that threat must be in writing, and the thing intended to be prevented was the misery occasioned to the party who had received the intimation that his premises would have the calamity of fire brought upon them. Unless the law went so far as to make it punishable to create that fear by any language the author knew would create that fear, the law would be powerless. The very fact of saying ironically, “I don’t say you are a thief,” could be expressed in such a way as to make anybody understand that the party meant to make that charge; and although there might be no single word in the letter which by itself would appear to mean so to a stranger, yet the party receiving it would perfectly well understand it. The jury must be satisfied that, when he wrote those words—“You will suffer as before”—the writer intended to create in the mind of the party receiving the letter, the fear that his house would be burnt down. Evidence might be offered that, under the particular circumstances, the words had not their ordinary meaning, but the meaning imputed to them upon the record, and therefore the witness might be asked whether he understood the meaning to be that which the record imputed. The witness considered it was a threat to burn his property.

REG.  
v.  
HENDY.

Demurrer—  
Deposition—  
Evidence.

## Ireland.

## COURT OF CRIMINAL APPEAL, DUBLIN.

June 13, 1850.

(Before PIGOT, C. B., PERRIN, J., BALL, J., CRAMPTON, J.,  
and TORRENS, J.)

REG. v. FITZSIMONS. (a)

*Indictment—Stat. 31 Geo. 3, c. 31.*

*An indictment for a misdemeanor for driving away cattle, under colour of a civil bill decree, between sunset and sunrise, against the form of the statute, &c., should aver that the party did so fraudulently.*

**A**T a General Sessions of the Peace held for the county of Wexford, at Enniscorthy, on the 27th March, 1850, Richard Fitzsimons was charged upon an indictment as follows:

*County of Wexford, to wit.*—The jurors, &c. present, that Richard Fitzsimons, of Dromgoold, in the county of Wexford, labourer, on the 27th day of March, in the thirteenth year of the reign of our Sovereign Lady Victoria, after the hour of sunset, and before the hour of sunrise, to wit, at the hour of four of the clock in the forenoon of the said day, with force and arms, at Ballybrennan, in said county, did take, seize, and drive away certain cattle, to wit, two cows, each of the value of 5*l*, the property of Matthew Culrill, under colour of a civil bill decree, against the form of the statute in such case made and provided, and against the peace, &c.

The said R. Fitzsimons pleaded Not guilty; but after he had pleaded, and had been given in charge to the jury, and not before, it was objected, on his part, to the indictment, which was framed on the statute 31 Geo. 3, c. 31, s. 4 (Ir.), (b), that it was bad on the face of it, inasmuch as that when charging that the cattle mentioned in it were taken, seized and driven away by the said R. Fitzsimons, between sunset and sunrise, on the day and from the place in the indictment set forth, under colour of a civil bill decree, it omitted to state that the cattle were so taken,

(a) Reported by J. R. O'FLANAGAN, Esq., Barrister-at-Law.

(b) This section enacts, that if any cattle or goods shall be taken and carried away under colour of any decree obtained upon any civil bill, between the hours of sunset and sunrise, the person so taking shall be guilty of misdemeanor, &c.; and on any indictment for this offence, it shall be sufficient to allege generally, that the party *fraudulently* and contrary to the intent of this act, carried away such cattle or goods between the hours of sunset and sunrise, without describing more particularly the circumstances of such offence.

seized and carried away by the said R. Fitzsimons, *fraudulently* and contrary to the intent of the statute.

In reserving the case for the judges in the Court of Criminal Appeal, Mr. Wills, assistant barrister for the county of Wexford, before whom the indictment was brought, observed that the statute referred to created and made the taking and carrying away cattle or goods between sunset and sunrise, under colour of a civil bill decree, a misdemeanor, and prescribed the punishment for it absolutely, and without any qualifications, or adverting to any intent whatever. It was only afterwards, when professing and intending to provide for facilitating the prosecution of the offence, that the words "fraudulently and contrary to the intent of the statute," were introduced by the Legislature, and might be held to amount to no more than to be effectually in this particular case supplied by the words "contrary to the form of the statute," which latter words are to be found in the indictment, as well as the material and important allegation that the cattle were taken, seized and driven away by the said R. Fitzsimons, between sunset and sunrise, *under colour of a civil bill decree*.

The trial having proceeded, and the traverser being convicted, judgment was deferred, and the said R. Fitzsimons liberated upon a proper recognizance of bail, to allow the judgment of the Court of Criminal Appeal to be taken on the sufficiency of the indictment.

*Monahan (Attorney-General)*, with whom was *Baldwin, Q. C.*, for the crown, admitted that this indictment, which was prepared at the sessions, was not sustainable under the act of Parliament.

*JACKSON, J.*—What would you consider it material to insert?

*Attorney-General.*—That the cattle were taken *fraudulently*, and contrary to the intent of the statute.

*CRAMPTON, J.*—An indictment at common law should state fully all the particulars, and when the prosecutor avails himself of a statute, he should have complied with its provisions. It is quite clear this indictment is bad.

*Attorney-General.*—The traverser shall be discharged immediately.

REG.

v.

FITZSIMONS.

Indictment—

31 Geo. 3, c. 31.

## COURT OF CRIMINAL APPEAL, DUBLIN.

*June 24, 1850.*

(Before PIGOT, C. B., PERRIN, J., BALL, J., MOORE, J., and JACKSON, J.)

REG. v. MARGARET BYRNE. (a)

*Practice—Jurisdiction—Stat. 9 Geo. 4, c. 54, s. 21.**Where, at the trial, a prisoner pleaded guilty to an indictment for larceny, setting forth a previous conviction, and the judge, feeling some doubt as to his power to pass sentence of transportation, reserved the case for the consideration of this court:**Held, that no question having arisen on the trial, and because the crown, or the prisoner, could bring a writ of error if a wrong sentence was pronounced, this court had no jurisdiction to entertain it.**The 9 Geo. 4, c. 54, s. 21, providing the penalty of transportation, when a prisoner is convicted of felony, not punishable with death, after a previous conviction for felony, is not repealed.*

THIS case was reserved for the Court of Criminal Appeal by Ball, J., at the Spring Assizes for Wexford, in 1850, on the construction of the 3rd section of 12 Vict. c. 11, as to whether it was competent for him to pass a sentence of transportation on a prisoner convicted of larceny upon an indictment after a former conviction.

The indictment was as follows:—

*County of Wexford, to wit.*—The jurors, &c. present, that heretofore, to wit, at a General Assize and General Gaol Delivery, held at Wexford, in and for the said county of Wexford, on the 2nd day of March, in the ninth year of the reign of our Sovereign Lady Victoria, Margaret Byrne was then and there convicted of felony, and which said conviction is still in full force, strength and effect, and not in the least reversed, annulled or made void. And the jurors aforesaid, upon their oath aforesaid, do further present, that Margaret Byrne, late of, &c., being so convicted of felony as aforesaid, afterwards, &c. Then follows an indictment for larceny.

The prisoner pleaded *guilty* to this indictment, and the learned judge doubted whether he could pass sentence of transportation.

By the 9 Geo. 4, c. 54, s. 21, it is enacted, “that if any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony, such person shall be

(a) Reported by J. R. O’FLANAGAN, Esq., Barrister-at-Law.

liable to be transported for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

By the 9 Geo. 4, c. 55, s. 3, it is enacted, "that any person convicted of simple larceny, or of any felony thereby made punishable like simple larceny should, except in the cases thereafter otherwise provided for, be liable to be transported for seven years, or to be imprisoned for any term not exceeding two years."

By the 12 Vict. c. 11, s. 1, the foregoing enactment of the 9 Geo. 4, c. 55, s. 3, is repealed, so far as relates to the transportation of any such offender; and it is enacted, that "every such offender, so convicted, shall be liable to be otherwise punished as by the said act of the 9 Geo. 4, c. 55, is provided." The 3rd section of this act, 12 Vict. c. 11, then provides, that "when any person has been twice convicted of any of the offences punishable by summary conviction under certain acts therein mentioned, if the person so twice convicted shall afterwards commit simple larceny, or any offence by the said act of the 9 Geo. 4, c. 55, made punishable like simple larceny, such offender, being convicted thereof, shall be liable to be punished as if the said act of 12 Vict. c. 11, had not been passed."

On the part of the crown it was submitted, that the judge had power to transport the prisoner, having been previously convicted; that, notwithstanding the 12 Vict. c. 11, the 21st section of the 9 Geo. 4, c. 54, was still in force, and unrepealed. The question of competency to transport was then reserved for the consideration of this court.

This case having stood over from a former day, in order that notice should be given to the prisoner, that the question whether this was such a case as the court could entertain under the 11 & 12 Vict. c. 78, might be considered;

No counsel appeared for the prisoner.

*Monahan (Attorney-General)*, with whom was *Baldwin, Q. C.*, now submitted, that this was not a case within the statute regulating the Court of Criminal Appeal, and that the right to bring a writ of error was not taken away. The sentence, by the 21st section of the act of Geo. 4, was discretionary in the judge, to be determined by the circumstances of the case, and if a wrong one was pronounced, it could be set right; but here no sentence was pronounced. The object of this court was to provide for points arising *at the trial*, as when, the indictment being right, evidence was admitted erroneously, or other matters that took place during the trial which, not being on the record, did not give a writ of error.

*FIGOT, C. B.*—In *Reg. v. Martin* (3 Cox's Crim. Cas. 447), on a case reserved under this statute, the judges heard the argument on the points reserved, although they appeared on the record, and were held to be in arrest of judgment.

*The Attorney-General.*—The 1st section of this act, 11 & 12 Vict. c. 78, empowers the judge to reserve any question of law which shall have arisen on the trial for the consideration of this court.

*BALL, J.*—There may be a question whether this point has arisen

REG.  
v.  
BYRNE.  
—  
*Jurisdiction—*  
*Practice—*  
*Stat. 9 Geo. 4,*  
*c. 54, s. 21.*



REG.  
v.  
BYRNE.  
—  
Jurisdiction—  
Practice—  
Stat. 9 Geo. 4,  
c. 54, s. 21.

on the trial, the difficulty not having occurred until sentence was about being pronounced.

The *Attorney-General*.—The 1st section of the act provides that this court shall have authority to respite the judgment on conviction, or postpone the judgment until the question reserved shall be decided. The 2nd section empowers the court to order an entry on the record, that, in the judgment of the court, the party convicted ought not to be convicted, or to arrest the judgment, or order judgment to be given thereon at some other session. Now in the case in which the judge postpones the sentence, how can this court direct judgment to be given? Suppose this court directed a sentence of transportation in a case where, in the opinion of the judge, the punishment was inapplicable, how could he be compelled to pronounce a wrong sentence?

BALL, J.—This appears to have been a *casus omissus* in the act.

The *Attorney-General*.—Yes; and perhaps not unintentionally so; because, when the objection appears upon the record, there is no reason why the party should be deprived of the writ of error.

PIGOT, C. B.—In this case we think this court has not jurisdiction under this act of Parliament. The act has already received the construction of the Court of Criminal Appeal in England, in *Reg. v. Faircler* (14 Jurist, 377), where it was held, the court had no jurisdiction to deal with judgment on demurrer, but left the party to his remedy by writ of error, and appeal to the House of Lords. Now, questions have occasionally arisen, as to whether the court will hear objections which appear on the record, as in *Reg. v. Webb* (3 Cox Crim. Cas. 183); and *Reg. v. Martin* (3 Cox's Crim. Cas. 447), and the court in both cases considered there was jurisdiction; but this case is different; and we think that, unless an act of Parliament gives jurisdiction expressly, so as to take away the right to bring a writ of error, we ought not to interfere. This act provides, that where any person shall have been convicted of any treason, felony, or misdemeanor, before any Court of Oyer and Terminer or Gaol Delivery, the judge before whom the case shall have been tried may, in his discretion, reserve any question of law *which shall have arisen on the trial* for the consideration of this court. Now, did this matter of difficulty occur on the trial? Has this question arisen *on the trial*, within the terms of this act? Certainly not. No judgment has been pronounced. What are the circumstances? Was there a trial at all? The entire functions of the judge and jury are discharged. All that remains to be done is for the court to give judgment: that is undisclosed in the mind of the judge, and no question arose on the trial. No question could arise until the judgment was pronounced, which would be on the record, and open to question by writ of error. We therefore do not think that this court has jurisdiction, no question having arisen on the trial. This court could not define the sentence which the judge would be bound to pronounce; as the *Attorney-General* has argued it, we cannot interfere with his jurisdiction as to the proper sentence.

BALL, J.—A single observation occurs to me; it is, that this statute ought to receive a liberal construction. Strictly speaking, there is no trial in a case circumstanced like the present, as there is no issue joined; so, if the statute is to be construed strictly, no question could be reserved. I do not see why a question may not properly be reserved for the consideration of this court under such circumstances; but, for the reasons suggested by the Attorney-General, I think this court has not jurisdiction in the present case.

PIGOT, C. B.—It is desirable to have this question as to the power of the judge to transport in such cases as the present set at rest.

The *Attorney-General*.—The attention of the clerks of the crown, and of the peace, being directed to this subject, will prevent any doubt in future. There is no question that the offence, when the indictment, as in the present case, is for a subsequent felony, is liable to the penalty of transportation.

REG.  
v.  
BYRNE.  
—  
Jurisdiction—  
Practice—  
Stat. 9 Geo. 4,  
c. 54, s. 21.

## OXFORD CIRCUIT.

### STAFFORD SPRING ASSIZES.

March 15, 1850.

(Before Baron PLATT.)

REG. v. WOOLLEY. (a)

*Embezzlement—Friendly society—Master and servant.*

*The secretary of an unenrolled friendly society, whose duty it is to receive the weekly contributions of the members, to enter them in a book, and hand over the amount to the treasurer, who in his turn pays it into a bank in the names of the trustees of the society, may be properly described as the servant of the trustees in an indictment charging him with embezzling sums so received, and he cannot be described as the servant of the treasurer.*

*Where, in an indictment for embezzlement, there is a second count charging another act of embezzlement within six months from the first, under the act 7 & 8 Geo. 4, c. 29, s. 48, but alleging the money to be the property of a different person from that mentioned in the first count, the words connecting the second count with the first may be rejected as surplusage, and the second count dealt with as an independent count.*

THE prisoner, William Woolley, was indicted for embezzlement. The 1st count alleged that the said William Woolley, on the 13th of August, A.D. 1849, being then employed as clerk and

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

REG.  
v.  
WOOLLEY.  
—  
*Embezzlement*  
—*Friendly*  
*society.*  
Indictment.

servant to William Nichols, did, by virtue of his said employment, and whilst he was so employed, receive into his possession certain moneys specified in the indictment, to the amount of six shillings and fivepence, for and in the name, and on account of the said William Nichols, his master, and the said money then and there did embezzle, &c.

The 2nd count alleged that the said William Woolley afterwards, and within six calendar months from the time of the committing of the said offence in the 1st count mentioned, to wit, on the 13th of August, A.D. 1849, being then employed as clerk and servant to Edward Mark Baker and others, his partners, did, by virtue of such last-mentioned employment, whilst so employed as last aforesaid, receive into his possession certain specified moneys to the amount of six shillings and fivepence, for and in the name, and on account of the said Edward Mark Baker and others, his partners, and the said last-mentioned money within six calendar months did embezzle, &c.

Evidence.

It appeared in evidence that the prisoner was the secretary of the Earl of Uxbridge Lodge of Odd Fellows at Burton-upon-Trent, at an annual salary of three pounds, having been appointed by a vote of the lodge in 1845. The salary was paid out of the general funds of the society. It was the prisoner's duty as secretary to attend at the "lodge" on lodge nights, to receive the contributions or payments due from the several members, and to enter these contributions, as he received them, night by night, in a book called the contribution book, and also to signify such receipt by affixing his signature to the card kept by each member. He had then to add up the whole of the contributions so paid and entered, and to pay the amount to William Nichols, the treasurer, who in his turn paid it into a bank in the names of the trustees of the lodge, five in number, of whom Edward Mark Baker was one.

In the month of November, 1848, it was discovered that several members had paid their contributions, and that there was no entry of the payments by them. With regard to the six shillings and fivepence in question, it appeared that one Samuel Knight, a member of the lodge, lived in Birmingham, but requested his relations in Burton-upon-Trent to pay his contributions; that his sister went on a lodge-night to the public-house, where the lodge met; that the prisoner came down from the lodge-room, and she asked him how much her brother owed; that he went up to the lodge-room, and then came down and said it was ten shillings and fivepence, and received ten shillings and sixpence from her. She asked for a card. He said he had none. She then required a receipt, and he went up and brought back the penny change, and a receipt for the ten shillings and fivepence. It was proved that, on that night, there was in reality only six shillings and fivepence due from Knight, and that the prisoner made no entry whatever of the receipt of either the ten shillings and fivepence, or the six shillings and fivepence—either on that night or any subsequent occasion, until November, when the books were taken from him, and he was

removed from office by a vote of the lodge. The rules of the lodge had not been enrolled.

At the close of the case for the prosecution,

*Vaughan*, for the prisoner, submitted that the indictment was not sustained by the evidence. The first count alleged that the prisoner was servant to one William Nichols. No such relationship of master and servant was shown by the evidence to exist. On the contrary, the evidence showed that the prisoner acted as secretary to the society: he was paid by the society, and was suspended by the society. It was true that, by one of the regulations of the lodge, the money received by the secretary was to be paid to Nichols as treasurer, but he was merely the conduit pipe of the money, there was no evidence of the rights of a master having been exercised by Nichols, either as to the appointment, duties or dismissal of the prisoner.

PLATT, B.—I am with you as to the first count; but what do you say to the second count?

*Vaughan*.—The 2nd count alleges that the prisoner, within six months from the committal of the offence mentioned in the first count, being employed as clerk and servant to Edward Mark Baker and others, embezzled certain moneys received on account of the said Edward Mark Baker and others. The statute 7 & 8 Geo. 4, c. 29, s. 48, which empowered the addition of the second charge, applied only to the case of an embezzlement of the moneys of the same master as in the 1st count. The language of the act is, "that it shall be lawful to charge in the indictment, and proceed against the offender for any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him against the same master within the space of six calendar months from the first to the last of such acts." It should have been alleged in the indictment, therefore, that the moneys in the 2nd count were the moneys of the same count mentioned in the 1st count.

*Meteyard* (with whom were *Huddleston* and *P. M' Mahon*) for the prosecution. The words "within six months," &c., may be considered as struck out of the count, and regarded as surplusage.

PLATT, B.—I was going to say that those words may be struck out. I am of opinion it is a good count without those words. The case must go to the jury on the 2nd count, as if the 1st count were not in the indictment.

*Vaughan* then submitted that there was no evidence on the 2nd count that the prisoner was servant to Edward Mark Baker and others. It must be shown that the prisoner was expressly appointed by Edward Mark Baker and others, of whom the prisoner himself is one. [PLATT, B.—You say the word "others" includes the prisoner.] Yes. If the indictment is intended to mean Edward Mark Baker and all other members of the society, the prisoner is included. If not meant to include the prisoner, then there is no evidence of an appointment by Edward Mark Baker and any others, excluding the prisoner. Now there was no evidence of any appointment or dismissal by either of these parties.

REG.

v.

WOOLLEY.

Embezzlement  
—Friendly  
society.

REG.  
WOOLLEY.  
—  
Embezzlement  
—Friendly  
society.

[PLATT, B.—Who might call upon the prisoner to account?] The society only, including himself.]

*Meteyard* and *P. M'Mahon*.—The prisoner, if not servant of the treasurer, was servant of the trustees of the lodge. The moneys paid to the treasurer were to be reinvested in the names of trustees: whatever money had been received was received on account of the trustees. [PLATT, B.—It is very difficult to distinguish this case from that of a cashier of a bank.] *The King v. Hall* (1 Moo. C. C. 474), is all fours with this case. It was there held, that a member of, and secretary to, a society, who fraudulently withheld money received from a member to be paid over to the trustees, was guilty of embezzlement, and properly described as the clerk and servant of the trustees, and that the money was properly stated as their property, although the money ought, in the ordinary course, to have been received by the steward; and although the articles of the society were not enrolled. Even assuming that the prisoner, being himself one of the members, was included in the word "others," that point was taken in a case before Mr. Justice Erle at the last Monmouth Assizes, (b) and that learned judge ruled that he should consider the prisoner included or excluded in the word "others," as the justice of the case might require. *Reg. v. Miller* (2 Moo. C. C. 349) was also referred to.

*Vaughan*, in reply.—There are several cases relating to assistant overseers where a somewhat contrary doctrine to *The King v. Hall* has prevailed; and in the case of *Reg. v. Waite* (2 Cox Crim. Cas. 245), it was held, that a clerk and member of a friendly society, who stated that he could put out the money of the society to advantage, and with the consent of the members drew it out of the bank where it was invested, and appropriated it to his own use, was not a clerk or servant of the society, but a part owner of the money, and therefore could not be indicted for embezzlement or larceny.

PLATT, B.—That case does not apply. Mr. Justice Coleridge there says, "upon the facts, as stated by the prosecution, I think this indictment cannot be maintained. The prisoner was trustee for the whole club: he received the money with the consent of the club for the purpose of investing it. He was part owner, and could not be guilty of stealing his own property; and the charge of embezzlement cannot be sustained, because clearly he was neither the clerk nor servant of the club, under the circumstances, nor did he receive the money as such, but as a partner, and therefore as an owner." That is a very different case from the present, where it is clear the money was received by the prisoner in his capacity of secretary. After the decision in *Rex v. Hall*, I cannot withdraw this case from the jury. I should be unwilling to let any objection of this kind, which shuts out the merits of the case, prevail. The objections must be overruled.

*Vaughan* then addressed the jury.

*Verdict, Not guilty.*

(b) See *Reg. v. Turberville*, ante, p. 13.

## OXFORD CIRCUIT.

## STAFFORDSHIRE SPRING ASSIZES.

March 17, 1850.

(Before Mr. Justice PATTESON.)

REG. V. WOOLLEY.(a)

*Embezzlement—Master and servant—Indictment—Capacity of clerk and servant—Construction of the statute 7 & 8 Geo. 4, c. 29, s. 47.*

*Where, by the rules of certain unenrolled friendly societies, the members of one lodge were at liberty to pay their contributions to another lodge, if more convenient to them so to do:*

*Held, that in an indictment against the secretary of a lodge for embezzling moneys received from a member of another lodge, the moneys may be laid as the property of, and the prisoner may be alleged to be clerk and servant to, the trustees of his lodge, to whose account all moneys received by him ought to be paid, although the trustees, in their turn, would, in this instance, have to account to the other lodge for the particular sum received on its behalf.*

*The secretary of an unenrolled friendly society, who is paid a yearly salary out of its funds, is properly described in the indictment as clerk and servant to the trustees, and it would be incorrect to designate him as employed in the capacity of clerk and servant. The latter description only applies, where the prisoner is employed on temporary occasions, and does not usually fill the situation of clerk or servant.*

THE prisoner was indicted for embezzlement. The indictment Indictment. contained six counts. The 1st count charged that the prisoner, on the 25th of September, 1849, being employed as clerk and servant to Edward Mark Baker and others, did, by virtue of his said employment, and whilst he was so employed, receive into his possession certain money, to the amount of one shilling, for and in the name and on account of the said Edward Mark Barker and others, and the said money then and there did embezzle, &c.

The 2nd and 3rd counts alleged similar acts of embezzlement, within six calendar months from the time of committing the offence in the 1st count.

The 4th, 5th, and 6th counts alleged the moneys to be received on account of, and the prisoner to be the clerk and servant to, one William Nichols.

The facts proved in support of the prosecution showed that the prisoner was the secretary to the Earl of Uxbridge Lodge of Odd

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

REG.  
v.  
WOOLLEY.  
—  
*Embezzlement*  
—*Master*  
and *servant*—  
7 & 8 Geo. 4,  
c. 29, s. 47.

Evidence.

Fellows, at Burton-upon-Trent. This lodge was a lodge within the Manchester Unity, and, according to the general rules of the lodges, a member of any lodge within the Manchester Unity could pay his contributions to any other lodge within the unity, if more convenient to him to do so. Joseph Rastall, a member of the Byron Lodge of Odd Fellows at Nottingham, within the Manchester Unity, removed, in 1847, from Nottingham to Burton-upon-Trent, when it became convenient to him to avail himself of the above regulation by paying his contribution of one shilling a fortnight to the Earl of Uxbridge Lodge. He accordingly attended the latter lodge on lodge-nights, and paid his contribution to the prisoner, whose duty it was to attend the lodge, receive the contributions of members, and enter the payment on a card, which each member kept and produced to the secretary from time to time. A book was also kept, called the contribution book, in which it was the prisoner's duty, as secretary, to enter the contributions of all members as he received them night by night, and then to add them up in the book and pay the total amount received to William Nicholls, the treasurer of the Earl of Uxbridge Lodge for the time being. It was also the prisoner's duty to enter this total amount in the cash ledger. Nichols, the treasurer, paid all money he received into a bank in the names of the trustees, of whom there were five, of the Earl of Uxbridge Lodge. Edward Mark Baker was one of the trustees. The prisoner was appointed, by a vote of the lodge, the paid secretary of the lodge in 1845, at a yearly salary of 3*l.* as permanent secretary.

Joseph Rastall proved that, on the 25th of September, 1848, he attended the lodge-meeting, and there paid the prisoner the sum of one shilling, which he, Rastall, was indebted to the Byron Lodge. The prisoner marked the witness's card, and wrote his initials at the foot. Another shilling was paid to the prisoner on the next fortnightly meeting, viz., the 9th of October, in the same manner; and a third shilling, under similar circumstances, on the 6th of November, the prisoner on these occasions also marking and signing the member's card.

It was then proved, by the evidence of Nichols, the treasurer, and of Baker, one of the trustees, and the production of the books, that the prisoner had not made any entry in the contribution book of the receipt of any money from Rastall on these nights; that on each occasion he had added up the sums purporting to have been then received by him, and inserted a corresponding sum in the cash ledger, and paid these sums into the bank. On neither occasion did the amount include Rastall's contribution. It was for the embezzlement of these sums that the prisoner was indicted.

At the close of the case for the prosecution, *Vaughan* objected that there was no evidence of the relationship of master and servant between the prisoner and Baker. [PATTESON, J.—The three last counts are not made out. The evidence is, that the prisoner was servant, not to the secretary, but to the trustees.] Then, as to the first set of counts, the prisoner was not servant to Edward Mark

Baker and others, in respect of the moneys received from Rastall. The evidence was, that the one shilling was due to, and received by, the prisoner for the Byron Lodge at Nottingham.

PATTESON, J.—I think not. The prisoner received the money as clerk and servant to the trustees of the Earl of Uxbridge Lodge, at Burton-upon-Trent, who, in their turn, would account for it to the Byron Lodge, at Nottingham. The contribution from Rastall appears to have been received and payable in the same way as a contribution from the ordinary members of the Burton Lodge. It appears, or ought to do so, equally with those sums, in the contribution book. The money is received and carried, in the first instance, to the use of the trustees of the Uxbridge Lodge.

Vaughan then objected that it was not proved that the prisoner was a clerk or servant. The statute referred to clerks and servants, and to persons employed in the capacity of a clerk or servant. Upon the evidence, and as it stood, the prisoner was not a clerk or servant, but was a person employed *in the capacity* of a clerk or servant. In *Miller's case* (2 Moo. C. C. 249), the indictment charged the prisoner with embezzling the moneys of trustees of a friendly society, and it was there alleged that the prisoner was in the *capacity* of a clerk and servant. So ought it to have been in the present case.

Meteyard (with whom were Huddleston and P. M<sup>r</sup> Mahon) for the prosecution, cited *Rex v. Hall* (1 Moo. C. C. 474), where, under similar circumstances, the secretary was described as the clerk and servant of the trustees of the friendly society. The present indictment was framed on that case.

PATTESON, J.—*Hall's case* appears to be precisely in point. (b) I think the more accurate way is to describe a person in the situation of the prisoner as clerk and servant. In the *capacity* of clerk and servant only applies where the prisoner is employed on temporary occasions, and does not usually fill that situation.

Vaughan then addressed the jury for the prisoner.

*Verdict, Not guilty.*

REG.  
v.  
WOOLLEY.

Embezzlement  
—Master  
and servant—  
7 & 8 Geo. 4,  
c. 29, s. 47.

(b) See this case cited, *ante*, p. 251.



## OXFORD CIRCUIT.

## STAFFORDSHIRE SPRING ASSIZES.

March 15, 1850.

(Before Baron PLATT.)

REG. v. ELLIS. (a)

*Forgery—Warrant for the payment of money—Request for the delivery of goods—Extrinsic evidence.*

*A document in the following form, "W. Trim, 2s.," is neither a warrant for the payment of money, nor a request for the delivery of goods, within the 11 Geo. 4 & 1 Will. 4, c. 66, ss. 3, 10, and cannot be shown to be so by parol evidence. An indictment, therefore, for forging a warrant for the payment of money, and (in another count) for forging a request for the delivery of goods, cannot be supported by proving a forgery of an instrument in the above terms, and by showing that the bearer, on presenting it at a shop, would, by the course of dealing between "W. Trim" and the shopkeeper, be entitled to receive goods to the amount of two shillings.*

Indictment.

THE indictment contained four counts. The 1st count charged the prisoner with having forged a certain warrant for the payment of money (to wit) for the payment of two shillings, with intent to defraud Thomas Hoof and others. In the 2nd count, the instrument was described as a request for the delivery of goods to the amount and of the value of two shillings. In the 3rd and 4th counts, the prisoner was charged with uttering the instrument as described in the 1st and 2nd counts respectively.

Evidence.

The prosecutors in this case were Messrs. Hoof and Hill, railway contractors. Their manager, William Trim, by their direction issued notes or tickets to the workmen, which, on being presented at a shop, kept by one Moses Hughes, at Horsely Fields, Wolverhampton, entitled the holder (by an agreement made between Messrs. Hoof and Hill, and Hughes the shopkeeper) to receive goods to the amount mentioned in the ticket, varying from two shillings down to threepence and twopence. These tickets

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

were given to the workmen in lieu of wages in money. They were printed, and in the following form :—

W. TRIM. <hr style="width: 20%; margin: 5px auto;"/> 2s.  No.
--

REG.  
v.  
ELLIS.  
—  
Forgery—  
Warrant or  
request.

It was proved that the prisoner went to a printer in Wolverhampton, and, producing one of these tickets, requested to have fifty printed exactly like that. The printer executed the order, and the prisoner paid 4s. for the cards, observing that he should want a great quantity of them. In consequence of the printer having communicated with the police before he executed the order, the prisoner was taken into custody immediately after he left the printing-office with the cards. The forged tickets, therefore, were never actually uttered by him. At the close of the case for the prosecution,

*Spooner*, for the prisoner, submitted that the facts did not bear out the charge laid. The ticket was neither a warrant for the payment of money, nor a request for the delivery of goods. [PLATT, B.—It is clearly not an order for the payment of money. The only question is, whether it is a request for the delivery of goods.]

*Rupert Kettle*, for the prosecution.—The evidence shows that, by the arrangement between the prosecutors and the shopkeeper, the latter, on the production of a ticket in this form, supplies goods to the bearer to whatever amount is expressed on it. It is an authority to him to deliver those goods. It is not necessary that the document should, within the four corners of it, appear to be a request for the delivery of goods. It may be shown to be so by extrinsic evidence—that has been done here. [PLATT, B.—It is just like a turnpike ticket. Why not call this a promissory note? It would be just as reasonable to say that, by parol evidence, you will show that this is a promissory note, as to say you may show it to be a request for the delivery of goods.] Adopting the illustration suggested, of a turnpike ticket, if Messrs. Hoof and Hill were accustomed to pay in turnpike tickets, and the prisoner was aware of the fact, and forged or uttered one with a fraudulent intent, he would be liable on a similar indictment to the present. There were several cases showing that a request, to be within the statute (11 Geo. 4, c. 66, s. 10), need not be signed or addressed to any person. *R. v. Cullen* (1 Moo. C. C. 300); *Reg. v. Thomas* (2 Moo. C. C. 16); *Reg. v. Pulbrook* (9 C. & P. 37.)

*Spooner*, in reply.—It is true that a request need not be signed by, or directed to, any particular individual, but neverthe-

REG.  
v.  
ELLIS.  
—  
*Forgery—  
Warrant or  
request.*

less there must be something on the face of the document to give it the colour of a request. In this case, supposing the ticket was signed and addressed, there would be nothing to show how it was intended to operate. If any inference at all could be drawn as to its effect, from the mere characters impressed on it, it would be that 2s. in money was to be paid to the bearer, but the evidence showed that it operated in a very different way.

PLATT, B.—I am of opinion that the document should show on the face of it that it is a request, and that you cannot by parol make a thing a request, if it does not, on the face of it, bear that construction; but I will consult Mr. Justice Patteson.

His lordship then retired, and on his return, said,

“I have discussed this case with my brother Patteson, and he entirely agrees with me that this is neither a warrant for the payment of money, nor a request for the delivery of goods. The prisoner must be, therefore, acquitted.”

*Verdict, Not guilty.*

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## OXFORD CIRCUIT.

STAFFORDSHIRE SPRING ASSIZES.

March 18, 1849.

(Before Mr. Justice PATTESON.)

REG. v. ARUNDEL AND SMITH. (a)

*Evidence—Competency of one prisoner as a witness for another—6 & 7 Vict. c. 85.*

*A prisoner, who pleads guilty is a competent witness on behalf of another prisoner indicted jointly with him. The proviso in the 6 & 7 Vict. c. 85, declaring that the provisions of that act shall not render competent any party to any suit, action or proceeding individually named in the record, relates only to civil proceedings.*

THE prisoners were jointly indicted for robbery. Arundel pleaded guilty.

The prisoner, Smith, was then put on his trial.

On the close of the case for the prosecution, the prisoner, who

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

was undefended by counsel, requested that the prisoner, Arundel, who was in the dock, might be called as a witness on his behalf, to prove that he, Smith, was not present at the time of the robbery.

*Lee*, for the prosecution, submitted that Arundel was not a competent witness for Smith on this indictment, to which he himself was a party. The proviso in Lord Denman's Act, 6 & 7 Vict. c. 85, s. 1, declared that that act "shall not render competent any party to any suit, action or proceeding individually named in the record." The statute, in a previous part of the section, enacted "that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation, &c., notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the suit, action, or proceeding in which he is offered as a witness may have been previously convicted of any crime or offence." This part of the statute had express reference to criminal proceedings, and there being no words to confine the operation of the proviso, it must be taken to be co-extensive with the enabling part.

PATTESON, J.—I think the proviso relates only to civil proceedings, and that a man who has pleaded guilty may be a witness for another prisoner tried on the same indictment.

*Verdict, Not guilty.*

REG.  
v.  
ARUNDEL.

Evidence—  
Disability of  
prisoner—Lord  
Denman's Act.

## OXFORD CIRCUIT.

SHROPSHIRE SPRING ASSIZES.

*March 21, 1850.*

(Before Mr. Justice PATTESON.)

REG. v. NEWTON. (a)

*Practice—Cross-examination.*

*A witness cannot be asked on cross-examination whether, when he was examined before the magistrate, he recollected such and such a particular fact.*

THE prisoner was indicted for murder.

On the cross-examination of a witness for the prosecution, *Huddleston* asked him whether, when he was examined before the magistrate, he recollected such and such a particular fact?

PATTESON, J.—I cannot allow that question to be put.

*Huddleston* stated that the question had been allowed by the late Mr. Justice Coltman to be put to this witness on the occasion of the first trial of the prisoner.

PATTESON, J. said he had a great respect for the opinion of Mr Justice Coltman, but the question was evidently an evasion and an attempt, by a side-wind, to get a contradiction between the testimony of the witness in the box, and his statement before the magistrate, without putting in the deposition. This was clearly irregular, and could not be permitted.

The question was then withdrawn, and the cross-examination of the witness proceeded.

The prisoner was acquitted.

*Phillimore* and *Best* for the prosecution.

*Huddleston* and *R. Kettle* for the prisoner.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

## OXFORD CIRCUIT.

## HEREFORDSHIRE SPRING ASSIZES.

*March 26, 1850.*

(Before Mr. Justice PATTESON.)

REG. v. HORNE. (a)

*Indictment—Felony—Statute 5 Geo. 4, c. 84—Returning from transportation—Form of certificate of conviction.**The offence of returning from transportation before the expiration of a sentence is made a felony by the stat. 5 Geo. 4, c. 84, s. 22. In an indictment for that offence it is necessary to aver that the prisoner was feloniously at large before the expiration of his sentence, and an indictment omitting the word "feloniously" is bad.**Under section 24 of the above statute, which makes a certificate of the conviction (omitting the formal part of the record,) evidence, a certificate stating that "at the General Quarter Sessions of the Peace of our Lady the Queen, holden at M., in and for the county of K., on, &c., J. H., late of, &c., was in due form of law tried and convicted on a certain indictment against him, for," &c., is sufficient, without any more formal caption.*

**T**HE prisoner was indicted for returning from transportation before the expiration of his sentence.

The indictment was in the following form :—

Herefordshire, to wit.—The jurors, &c., upon their oath, present Indictment.  
that at the General Quarter Sessions of the Peace of our Lady the Queen, holden at Maidstone, in and for the county of Kent, on the 15th day of October, in the third year of the reign of her present Majesty Queen Victoria, John Horne, then late of the parish of Hadlow, in the county aforesaid, labourer, was in due form of law tried and convicted on a certain indictment against him for feloniously breaking and entering the dwelling-house of Thomas Peacock, on the 23rd day of September, in the third year of the reign aforesaid, at the parish aforesaid, in the county aforesaid, and stealing in the said dwelling-house two gowns of the value of, &c., of the goods and chattels of the said Thomas Peacock, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity, and was thereupon ordered and adjudged to be transported beyond the

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

REG.  
v.  
HORNE.

*Returning from  
transportation--  
Indictment--  
Evidence.*

seas for the term of ten years, pursuant to the statutes in that behalf provided.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said John Horne, late of the parish of Ross, in the county of Hereford, labourer, afterwards, to wit, on the 19th day of June, A.D. 1847, with force and arms at the parish of Ross aforesaid, in the county of Hereford aforesaid, was at large without any lawful excuse within Her Majesty's dominions before the expiration of the term for which he had been so ordered to be transported as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Valentine Brown, an officer of the gaol at Maidstone, produced, on the part of the prosecution, a certificate of the conviction of the prisoner at the Quarter Sessions for Kent, held at Maidstone in October, 1839, and proved that the signature was that of Mr. Wildes, the deputy clerk of the peace for Kent. The certificate was then read as follows:—

Certificate of  
conviction.

“Kent.—These are to certify that at the General Quarter Sessions of the Peace of our Lady the Queen, holden at Maidstone, in and for the county of Kent, on the 15th day of October, in the third year of the reign of her present Majesty Queen Victoria, John Horne, late of the parish of Hadlow, in the county aforesaid, labourer, was in due form of law tried and convicted on a certain indictment against him for feloniously breaking and entering the dwelling-house of Thomas Peacock, on the 23rd day of September, in the third year of the reign aforesaid, at the parish aforesaid, in the county aforesaid, and stealing in the said dwelling-house two gowns, &c., of the goods and chattels of the said Thomas Peacock, against the form of the statute, &c., and against the peace, &c., and was thereupon ordered and adjudged to be transported beyond the seas for the term of ten years, pursuant to the statutes in that behalf provided. Dated the 14th day of March, 1850.—J. H. WILDES, Deputy Clerk of the Peace for Kent.”

*W. H. Cooke*, for the prisoner, objected to the sufficiency of this certificate as proof of the conviction. The 5 Geo. 4, c. 84, which was the statute under which the prisoner was indicted, enacted (sect. 24), “that the clerk of the court or other officer having the custody of the records of the court where such sentence or order of transportation or banishment shall have been passed or made, shall, at the request of any person on His Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part,) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation or banishment, which certificate shall be sufficient evidence of the conviction or sentence or order for the transportation or banishment of such offender; and every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence upon proof of the signature and official character of the person signing the same,”

&c. This was the section under which the prosecution sought to make the certificate just read sufficient proof of the conviction, but he submitted that, although the more formal part of the original indictment and record was rendered unnecessary to be set out, it was nevertheless necessary that the certificate should show upon the face of it that the court was properly constituted, and that the sentence passed upon the prisoner was consequently a legal one. That did not appear here. The caption merely stated that, at the Quarter Sessions of the Peace, holden at Maidstone, on such a day, John Home was convicted, &c.

PATTESON, J. inquired from the officer of the court as to the general practice, and on being informed that this certificate was drawn up in the usual form, held that it was sufficient, and overruled the objection.

Evidence was then given of the identity of the prisoner with the person mentioned in the certificate.

Cooke, submitted that the indictment was insufficient, as it did not allege that the prisoner was *feloniously* at large before the expiration of his sentence. It stated that the prisoner, "on the 19th day of June, &c. was at large without any lawful excuse within Her Majesty's dominions, before the expiration of the term for which he had been so ordered to be transported as aforesaid." The prisoner was indicted for felony, and the indictment should have averred that he was feloniously at large, &c.

Powell, for the prosecution, in support of the indictment.—The indictment charged the offence, against which the statute 5 Geo. 4, c. 82, provided, in the very words of that statute. It was therefore unnecessary to allege that the offence had been committed feloniously. The case differed from most statutable felonies in this, that statutes relating to such offences declared specifically that whoever committed them should be "guilty of felony," whereas there was no such provision in the statute 5 Geo. 4, c. 84. Section 22 enacted, that if any offender under sentence of transportation, "shall be afterwards at large within any part of his Majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported, &c., every such offender so being at large, being thereof lawfully convicted, shall suffer death as in cases of felony, without benefit of clergy." Now it was by no means clear, that because the punishment was to be the same "as in cases of felony," the Legislature meant to decree that the offence of returning from transportation should be a felony.

Cooke, in reply, urged that the language of the statute, declaring that the offender should "suffer death as a felon," made the offence a felony.

PATTESON, J.—I am clearly of opinion that the statute, in enacting that parties so offending should "suffer death as in cases of felony," made the offence a felony. There were certain words of the act which had, for a long period, been held necessary in indictments. In felonies the word "feloniously" was requisite.

REG.  
v.  
HORNE.

Returning from  
transportation—  
Indictment—  
Evidence.



REG.  
v.  
HOME.  
*Returning from  
transportation—  
Indictment—  
Evidence.*

It had not been inserted in this case as it ought to have been, and being omitted, the indictment was demurrable. The prisoner may have leave to withdraw his plea of not guilty, and demur.

*Powell*, suggested that if his lordship entertained any doubts on the point, the more convenient course would be to reserve it for the decision of the Court of Criminal Appeal.

*PATTESON, J.*—I have so strong an opinion on the point, that I am not inclined to reserve the question, as such a course might be drawn into a precedent, and encourage the introduction of great vagueness and uncertainty in pleading.

*The prisoner was discharged.*

[The omission of the word "feloniously" in this case, was a clerical error of the engrossing clerk in the indictment office, as it was inserted in the precedent laid before him.—J. E. D.]

## OXFORD CIRCUIT.

### MONMOUTHSHIRE SPRING ASSIZES.

*April, 1850.*

(Before Baron PLATT.)

REG. v. FROWEN AND OTHERS. (a)

*Indictment—Burglary—Guardians of union—Construction of statute 5 & 6 Will. 4, c. 69, s. 7—Venue.*

*In an indictment for burglary in the workhouse of a poor law union, the workhouse, being under the provisions of the stat. 5 & 6 Will. 4, c. 69, s. 7, may be described as the dwelling-house of the guardians of the poor of that union.*

*Semble, that the workhouse cannot be described as the dwelling-house of the master of the workhouse.*

*The indictment alleged that J. F., late of the parish of P., in the county of M., with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling-house of the guardians of the poor of the P. Union, there situate, feloniously did break and enter.*

*Held, a sufficient description of the situation of the workhouse, the words "there situate," referring not to the union, but to the parish before mentioned.*

THE prisoners were indicted for burglary. The indictment contained two counts. The 1st count was as follows:—

"Monmouthshire to wit.—The jurors for our Lady the Queen, upon their oath, present, that John Frowen, late of the parish of

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

Pontypool, in the county of Monmouth, labourer; George Frowen, late of the same parish, labourer; John Tadfield, late of, &c., labourer; and Jemima Hawkins, late of, &c., labourer, on the 20th day of January, A.D. 1850, about the hour of eleven in the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling-house of the guardians of the Pontypool Union, there situate, feloniously did break and enter, with intent the goods and chattels of the said guardians, in the said dwelling-house, then and there being, then and there feloniously and burglariously to steal, take and carry away, and then and there, in the said dwelling-house, ten pounds of flour, of the value of 5s.; fifty pounds of mutton, of the value of 18s., &c., &c., of the goods and chattels of the said guardians, in the said dwelling-house, then and there being found, then and there feloniously and burglariously did steal, take and carry away against the peace," &c.

REG.  
v.  
FROWEN.  
—  
Burglary—  
Indictment—  
Union  
Workhouse.

The 2nd count described the house as the dwelling of Thomas Perkins, and the goods stolen as his.

On the part of the prosecution, a burglary in the workhouse of the Pontypool Union was proved to have been perpetrated on the night of the day mentioned in the indictment, and various properties, which had been provided for the use of the poor, stolen therefrom. Thomas Perkins was the master of the workhouse, and resided in it. The guardians never actually occupied it beyond occasionally meeting within its walls.

Other evidence having been given to connect the prisoners with the felony,

*P. M' Mahon*, at the close of the case for the prosecution, submitted, that as to the 2nd count, which laid the workhouse to be the dwelling-house of Perkins, and the goods to be his goods, there was no evidence to go before the jury. There were many cases deciding that when a ministerial officer of a public body occupied a house, the property of the public body, it could not be described as his dwelling-house. Thus, where apartments are assigned to any person in a royal palace, a burglary committed in them must be laid to have been committed in the mansion of the Queen: (*R. v. Williams*, 1 Hale, 522.) So, also, where apartments in the house of a corporation are appropriated as lodgings for servants of the corporation, a burglary committed in them must be laid to have been committed in the dwelling-house of the corporation: (*R. v. Pickett*, 2 East P. C. 501.) The same rule applies in all other cases where the occupier has the use merely, and no interest in the apartments he occupies: (Archbold's Crim. Pleading, citing 1 Hawk. c. 38, s. 26.)

PLATT, B.—The goods stolen were clearly, for the purposes of this indictment, the goods of Perkins, and are well described as his. But there appears to be some foundation for the objection as to the description of the dwelling-house; but what objection is there to the 1st count, describing the house as the dwelling-house of the guardians?

REG.  
v.  
FROWEN.  
—  
Burglary—  
Indictment—  
Union  
Workhouse.

*P. M'Mahon.*—The first count is not supported, because the house has never in fact been the dwelling-house of the guardians. By the 5 & 6 Will. 4, c. 69, s. 7, the guardians of the poor of every union are made a corporation, and, as such corporation, are empowered to accept, take and hold for the benefit of the union, any buildings, lands or hereditaments, goods, effects or other property; and by that name to bring actions, to prefer indictments, &c., and in every such action or indictment relating to such property it is sufficient to lay or state the property to be that of the guardians of the — union. The act vested the parish property in the guardians, and authorized them as such owners to sue and prosecute. The act does not say that the law will adopt a fiction, by calling a workhouse the dwelling-house of the guardians, which, in fact, it is not. It may be and is their house, but it cannot be called their dwelling-house without a falsehood. Without the statute, that is to say, at common law, it is clear the property could not be laid in the guardians. Does the statute, then, make the workhouse the dwelling-house of the guardians? [PLATT, B.—How would you frame an indictment for burglary in a workhouse? You say it cannot be described as the dwelling-house of the actual occupier, nor of the guardians.] It might have been laid as a dwelling-house the property of the guardians, and in the occupation of so and so.

PLATT, B.—I must overrule the objection. The statute enacts that, in every indictment relating to the union property, it shall be sufficient to lay the property as that of the guardians. In this case it is laid as their dwelling-house, and I think correctly so laid.

*P. M'Mahon* then objected that the venue was not laid in the indictment with sufficient certainty. This was a local offence, requiring a venue to be laid in respect of the house broken into. The house was not, he submitted, stated to be in any parish. The indictment charged that John Frowen and others, of the parish of Pontypool, in the county of Monmouth, labourer, on, &c., with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling-house of the guardians of the poor of Pontypool Union, *there* situate, feloniously did break and enter. Now, a union consisted of several parishes, and as the words "*there* situate" must be taken to refer to the last antecedent, the indictment must be read as merely averring that the house was situated in the Pontypool Union, a description that would be clearly insufficient.

PLATT, B.—I am clearly of opinion that there is nothing in the objection. The words "*there* situate" does not refer to the union, but to the parish before mentioned.

The prisoners were ultimately convicted.

*Barrett* for the prosecution.

*P. M'Mahon* for the prisoner.

## OXFORD CIRCUIT.

GLOUCESTERSHIRE SPRING ASSIZES.

April 6, 1850.

(Before Mr. Baron PLATT.)

REG. v. BARNET. (a)

*Practice—Cross-examination—Depositions before a coroner.*

*There is no distinction between depositions before a coroner and before a magistrate with reference to the modes of cross-examination upon them. A witness cannot therefore be asked on cross-examination as to what he said before the coroner. But the deposition may be put into the witness's hands to read over to himself and refresh his memory.*

THE prisoner was indicted for murder. On cross-examination of Caroline Gregory, the principal witness for the prosecution,

*Symonds* asked her whether she had stated a particular fact when she was examined before the coroner at the inquest?

*Greaves*, Q.C., objected that the witness could not be asked as to what she said before the coroner, as that would appear by her deposition in writing.

*Symonds* submitted that there was a distinction between depositions taken before a magistrate and depositions taken by a coroner on an inquest. The rules framed by the judges on the passing of the Prisoners' Counsel Act, regulating the mode of examination and cross-examination on depositions, were confined to depositions before the committing magistrate.

PLATT, B., said he was of opinion the question could not be put, but he would consult Mr. Justice Patteson, who was sitting in the *Nisi Prius* Court upon the point. His lordship accordingly retired for that purpose, and on his return said, "I have consulted my brother Patteson on this question, and we have discussed it, and he thinks that the view I take of it is correct, and that there is no distinction whatever between depositions before a coroner and depositions before a magistrate. We think that you may place in a witness's hands anything which he has written or signed to refresh his memory; not to elicit from him what he may have stated before on the subject, but that having refreshed his memory you may put questions to him respecting the transaction itself which the writing refers to. If you wish to show the jury that he

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

REG.  
v.  
BARNET  
—  
Cross-  
examination.

has previously made a different statement, you must put in his deposition. I am not clear but that you may put any writing into the hands of a witness of a contemporaneous character, and when he has read it to refresh his memory, you may ask him any question as to facts it relates to."

The deposition of the witness before the coroner was then put into the witness's hands, and she read it to herself, after which the cross-examination was continued.

The prisoner was ultimately acquitted.

*Greaves*, Q.C., and *Huddleston* for the prosecution.

*Symonds* and *Powell* for the prisoner.

## NORTHERN CIRCUIT.

YORK SUMMER ASSIZES, 1850.

(Before Mr. Justice CRESSWELL.)

REG. v. CHARLES SUTCLIFFE. (a.)

### *Confession—Contradiction.*

*A voluntary confession, which enters into minute details of a crime, and states that the prisoner was one of the party concerned in its commission, is evidence to go to a jury when the corpus delicti is proved by evidence aliunde, although the witness proving such corpus delicti swears that the prisoner was not of the party engaged in the commission of the crime.*

THE prisoner was indicted, together with six other persons unknown, for a robbery, with violence, on William Hanson, on the 24th day of July, 1848.

At the Winter Gaol Delivery at York, in 1848, *five* men, called West, Lightowler, Clifford, Hall and Jowett, were tried for the robbery, on Hanson's evidence, convicted and transported for ten years.

Hanson proved that on the night of that day he was on his road from Bradford to Leeds, when he was attacked by *seven* men, his mouth filled with dirt, his belly cut with some sharp instrument, and his pockets rifled of three sovereigns, one half-sovereign, 1*l.* 14*s.*

(a) Reported by T. CAMPBELL FOSTER, Esq., Barrister-at-Law.

in silver, and his watch. He also proved that the night was *moonlight*, and that the prisoner was *not* one of the party who robbed him.

On the 2nd of May, 1850, the prisoner went to the office of Mr. John Taylor, an attorney at Bradford, and made a confession in great detail of the circumstances which he said attended the robbery. Among other things, he stated that the night was *dark*, that the robbery was committed by *six* men only, and that they were West, Smith, Fletcher, Patchett, Jowett and himself, and that Lightowler, Clifford and Hale were not concerned in it at all. This confession was taken down in writing, and was read over to and signed by him.

On the 23rd of May he voluntarily presented himself before the magistrates of the Bradford petty sessional division, and made another confession (after being cautioned in the manner directed by 11 & 12 Vict. c. 42, s. 18), precisely the same in substance as his confession of the 2nd of May. The last-mentioned confession was also read over to him, and he signed the whole. The concluding words were, "I have been a good while uneasy about this concern since this job was done, and I was determined that I would come out with the truth at last. I know that three men has gone innocent."

The prisoner defended himself, and stated that there was not a word of truth in the confessions he had made; but that after the trial in 1848, Samuel Clifford, a brother of the convict, Reuben Clifford, had offered him 100*l.* if he would make a confession in terms similar to the confessions which he had made to Mr. Taylor and the magistrates, and told him that he would come to no harm; and that he had made those confessions in consequence of that inducement. That he had received 3*l.* on account, and had lived with Samuel Clifford for more than a month, during which time he had taught him the story he had told.

CRESSWELL, J. left the entire facts with the jury. They had to decide the question whether the prisoner was speaking the truth now, or at the time when he made the confessions. They appeared to have been made with great deliberation, and one at a period of three weeks after the other. If they believed that the prisoner, under the instigation of remorse, had spoken the truth in those confessions, they must find him guilty; if, however, they believed his statement now, although that statement made him at all events a great rogue, they must acquit him.

*The verdict was, Not Guilty.*

*Bower*, for the prosecution. (b)

(b) See 2 Russ. by Greaves, 824-826. Mr. Greaves' very learned note is open to considerable question, as, in order to support his view, he *assumes* some fact in the various cases he cites on the subject, which does not appear in the reports. *Falkner's case* (R. & R. 481) would appear perfectly decisive as to the admission of a confession without evidence *aliunde*, and in that case to support the contrary view Mr. Greaves *assumes* that the prosecutor's deposition was read, a fact on which the report is entirely silent. *Wheeling's case* (1 Leach, 311) is also decisive upon the point, but is very briefly reported.

REG.  
v.  
CHARLES  
SUTCLIFFE.  
—  
Confession—  
Contradiction.

## CENTRAL CRIMINAL COURT.

FEBRUARY SESSION.

(Before Mr. Justice TALFOURD.)

*February 7, 1850.*REG. v. JAMES BOOBER, MARY BOOBER, and JAMES  
BOOBER, Jun. (a.)*Possession of coining implements—Possession of child—Husband and wife.**Where coining implements were found in a house occupied by a man, his wife, and a child ten years of age, the jury were directed to acquit the child of a felonious possession.**If coining implements are found in a house occupied at the time by a man and his wife, the presumption is that they are in the possession of the husband alone, unless there are circumstances to show that the wife was acting separately and without her husband's sanction; they cannot both be convicted.**The fact of a wife attempting to break up coining implements at the time of her husband's apprehension, if done with the object of screening him, is no evidence of a guilty possession.*

THE prisoners were indicted for feloniously having in their possession a mould on which was impressed the obverse side of a shilling. It appeared in evidence that the two first named prisoners resided together as man and wife, and the third prisoner was their son, a boy of ten years old. He was apprehended whilst in the act of passing a counterfeit half crown, and on the officer going to the house where he said he resided, the elder male prisoner was found in an upper room. In the lower room were found various coining implements, and amongst them the mould in question, and whilst the officers were searching the house the female prisoner came in and was observed soon afterwards to break something on the floor which turned out to be a mould used in casting counterfeit shillings. Counterfeit money was found upon her, but none upon the man.

*Payne*, who appeared for the woman and the younger prisoner, urged on behalf of the latter that, under the circumstances, the charge could not be sustained against him.

TALFOURD, J.—I do not think a boy of this age can be convicted upon such evidence as this. He is acting under the control

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

of his parents, they are living in the house where the coining implements are found, and it would be going too far to say that one so young was a joint possessor with them of the property. A verdict of acquittal of the boy was then taken, and he was put into the witness box by the elder prisoner to prove that the latter had been absent from home for several weeks prior to Friday, the 11th January, on which night he returned.

REG.  
v.  
JAMES BOOBER  
AND OTHERS.  
—  
Coining—  
Husband and  
wife.

*Payne* submitted, on behalf of the female prisoner, that if the male prisoner was found guilty on this charge, she must be acquitted. The charge was the having possession of coining implements, but the possession of the wife was the possession of the husband. If he possessed them, she must possess them too while she lived with him, but not in the sense which would render her amenable to this indictment. It was not like a charge which involved the proof of some act on the part of the wife. The breaking of the mould could not affect this position. If it was done to screen her husband, she would not be liable although such an act done by another person might make him an accessory after the fact.

TALFOURD, J. (to the jury.)—This is entirely a question for you. The man and woman are living together, and that is evidence from which you are at liberty to infer that they are man and wife. If you think so, and also believe that the man was in possession of these moulds, then you ought to acquit the woman, as she cannot in law be said to have any possession separate from her husband; but if you think that the criminality was on her part alone, and that he was entirely guiltless of any participation in her conduct, then she must be of course convicted. With regard to the man it appears that he occupies the room in which these things were found, and, *prima facie*, he would be presumed to be in possession of what the room contains, but this presumption may be rebutted, and you will take all the circumstances into your consideration and see whether or not any of them satisfy you that the trade was carried on there with his sanction. The circumstance of the woman trying to break the mould when the officers went to the house will not affect the case if you think that her object was to screen him from detection. Either of the prisoners may be convicted upon this evidence, but I do not think you can convict both.

The jury acquitted the woman and convicted the man.

*Bodkin* and *Clerk* for the prosecution.

*Prendergast* for the male prisoner.

*Payne* for the female.



## CENTRAL CRIMINAL COURT.

MARCH SESSION.

(Before the COMMON SERGEANT.)

March 6, 1850.

REG. v. BRACKETT. (a.)

*Larceny—Servant.*

*A shopman was authorized to sell his master's goods at the price marked upon them, but at nothing less; he sold a pair of trousers at a lower price than that marked and embezzled the money.*

*Held, not to be a larceny of the trousers.*

THE prisoner was indicted for stealing a pair of trousers, the property of his master. The evidence showed that the prosecutor was a tailor: the prisoner was in his service as clerk and shopman, and it was his duty to sell his master's goods at the price marked upon them; he had no authority to take less; that the trousers mentioned in the indictment were ticketed at 15s. but he sold them to a witness for 10s., which money he had kept.

*Parry* (for the prisoner) contended that on these facts the prisoner could not be convicted of larceny. It was no doubt a breach of duty and of trust to sell the goods at a lower price than they were marked, but it was not a felony. As far as the trousers were concerned, he did no more than he was authorized to do with them, namely, sell them; the fault was in accepting a less sum than he ought to have taken. No doubt if the 10s. was not given to his master that might establish a charge of embezzlement.

*Ballantine* (for the prosecution) submitted that it was entirely a question for the jury whether the prisoner had not an intention from the first to defraud his master of the money which he should receive for the goods. If so, the taking the trousers for the purpose of delivering them to the customer, would constitute a larceny. He was not authorized to sell them in the way he did, and the moment he dealt with them in a manner different from his instructions, he would be as guilty of stealing as though he had secretly taken them from his master's shop and converted them to his own use.

The COMMON SERGEANT was of opinion that the facts did not

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

constitute a larceny. On consulting Mr. Justice Wightman, that learned judge agreed with him, and the prisoner was acquitted.

*Ballantine* for the prosecution.

*Parry* for the prisoner.

REG.  
v.  
BRACKETT

### CENTRAL CRIMINAL COURT.

March 6, 1850.

(Before Mr. Justice CRESSWELL.)

REG. v. MILNER.

June 12, 1850.

(Before Mr. Justice PATTESON.)

REG. v. SIMPSON.

*Post office—Larceny by person employed under.*

*Quære, whether a person in the employ of a tradesman being a district postmaster, receiving wages for his trade services, but neither being employed by, nor receiving any remuneration from, the Post-office, becomes, by assisting his master occasionally in sending the letters and making up the letter bags, a person employed by the Post-office within the 7 Will. 4, and 1 Vict. c. 36.*

*But evidence that his master gave him a paper and told him to go before the magistrate to take the oath usually taken by persons in the employ of the Post-office, and get the paper properly filled up—that he went away and returned shortly after, exhibited the paper and said that he had taken the oath, was*

*Held sufficient to show that he was in such employ.*

**T**HE prisoner was indicted for that he being employed under the Post-office, did steal a post letter containing one half sovereign and one shilling the property of the Postmaster General. It appeared in evidence that a person named Daws was the postmaster of the district in which the letter was posted. He was a chemist; the prisoner was in his service as an assistant in his business, and received a salary from him but nothing from the Post-office; he used, however, occasionally to assist him in sorting the letters, one of which he was proved to have abstracted.

*Ballantine* (for the prisoner) submitted that, upon this evidence

REG.  
v.  
MILNER.  
—  
Post-office.

there was nothing to show that the prisoner was in the service of the Post-office. He appeared to be in the service of the chemist, and occasionally helped his master in sorting, but that would not constitute him a servant, nor could it be said that the Post-office employed him. If then he was not a servant, the letter was intrusted to him; he had legal possession of it, and his appropriating it afterwards would be a mere breach of trust and no felony.

CRESSWELL, J.—The sorting letters certainly does not appear to come within the legitimate duty of a chemist's apprentice. There may be some difficulty if no further evidence of employment by the Post-office can be given.

Mr. Daws was then recalled and stated that it was the practice for those similarly employed in district offices to go before a magistrate with a certain paper, get the paper filled up, and take an oath faithfully to perform the duties. That on the prisoner's entering his employ, he gave him such a paper telling him to go before a magistrate and take the oath required; that the prisoner went away, and upon his return told him that he had been before the magistrate and had taken the oath, and he showed him the paper properly filled up.

CRESSWELL, J.—I think that is quite sufficient.

*Clarkson* and *Bodkin* for the prosecution.

*Ballantine* for the defence.

June 12.

REG. v. SIMPSON.

In this case the prisoner was indicted for a similar offence. The evidence was of a similar nature; the prisoner being in the service of a district Postmaster, and occasionally assisting in making up the letter bags, but without being specially employed by, or receiving any remuneration from, the Post-office.

PATTESON, J.—I am not aware of any case in which it has been held that a person in the employment of a Postmaster is in the employ of the Post-office.

*Metcalfe* (for the prisoner) contended that such a service as was proved was insufficient. The prisoner's dealing with the letters was merely accidental, and was no part of his prescribed duty. In *R. v. Fearson* (4 Car. & P. 572) it was held that a person employed by a law stationer at a receiving house, to clean boots and shoes, was not a person employed under the Post-office within the 52 Geo. 3, c. 143, merely because he at times assisted in tying and sealing up the letter bags. In *Reg. v. Milner*, tried at this court in March, 1850 (see *supra*) Mr. Justice Cresswell was inclined to think that a person so circumstanced was not within the statute.

*Bodkin* (for the prosecution.)—In *R. v. Rees* (6 Car. & P. 606) it was held to be sufficient to prove that the prisoner acted in the capacity imputed to him. He referred to the more recent act relating to the Post-office: (7 Will. 4, and 1 Vict. c. 36.) *Reg. v.*

*Pearson* was decided upon the old statute (section 47 of the new one); the interpretation clause seemed precisely applicable to such a case as this.

PATTESON, J.—The interpretation clause seems almost as obscure as the enacting one, section 26. By it the expressions “persons employed by or under the Post-office, shall include every person employed in any business of the Post-office according to the interpretation given to the officer of the Post-office.” An officer of the Post-office is defined to be “the Postmaster General, and every deputy postmaster, agent, officer, clerk, letter carrier, guard, postboy, rider, or any other person employed in any business of the Post-office, whether employed by the Postmaster General or by any person under him, or on behalf of the Post-office.”

The prisoner’s master was recalled, and he proved that the prisoner took the oath referred to in *R. v. Milner* (*supra*.)

PATTESON, J.—That is quite sufficient, it brings the case precisely within the decision in *Reg. v. Milner*, upon which I shall act.

*Bodkin* for the prosecution.

*Metcalf* for the defence.

REG.  
v.  
SIMPSON.  
—  
Post-office.

## CENTRAL CRIMINAL COURT.

MAY SESSION, 1850.

(Before the RECORDER.)

May 6, 1850.

REG. v. SIMMONDS.

*False pretences—Infancy—Evidence.*

*On an indictment against a defendant for obtaining goods by falsely pretending that he was of full age, a plea of infancy in an action brought against him is not admissible for the purpose of proving that he was a minor.*

THE defendant was indicted for unlawfully obtaining goods by falsely pretending that he was at the time of full age, whereas he was, in fact, a minor. It appeared in evidence that the prosecutor had furnished the defendant with goods, for which payment

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

REG.  
v.  
SIMMONDS.  
—  
*False pretences*  
—*Evidence.*

was to be made by a bill of exchange; that he expressly asked the defendant whether he was of full age, and the latter assured him he was, and that but for this representation he would not have parted with his goods. He had subsequently brought an action against the defendant on the bill, but was defeated by a plea of infancy.

*Robinson* (for the prosecution,) now tended in evidence the plea of infancy.

*Parry* (for the defendant,) objected to its reception.—There was no proof that the defendant had ever seen the plea, or knew of its existence. The defence was probably conducted by his attorney, who took what course he thought advisable, possibly in his client's absence. Nothing was to be intended in a criminal case against a person charged except from what were clearly proved to be his own act or words. Numberless pleas were constantly put upon record which were avowedly false; and under such circumstances, even if the defendant's cognizance of such plea were established, it would not show what the prosecution must specifically prove, viz., that he was under age when the contract was made.

*Robinson* contended that the plea, if not conclusive, was at all events admissible against the defendant. It would be a question for the jury whether it was pleaded with his cognizance or not, and if that proposition was decided in the affirmative, surely it is conduct from which, as from every other act or declaration of a person accused, the jury may draw their own inference.

The RECORDER.—I do not think I ought to receive this evidence. Where you clearly identify a defendant with any act or declaration, no doubt the jury must decide what bearing it has upon the case, but I think it would be going too far to treat the putting in this plea as an act clearly brought home to the defendant.

*Note.*—This point was similarly decided in *R. v. Walters* (1 Cox Crim. Cas 99.)

## CENTRAL CRIMINAL COURT.

MAY SESSION.

May 9, 1850.

(Before Mr. Baron ALDERSON.)

REG. v. MOIR. (a)

*Evidence—Cross-examination—Deposition.*

*If upon a trial a witness makes a statement which does not appear in his deposition, he may be asked, on cross-examination, without his deposition being put in, whether he ever made such a statement before.*

THE prisoner was indicted for the murder of his wife.

On the trial, a witness for the prosecution deposed to a conversation she had had with the prisoner, but such conversation did not appear in the deposition.

*Ballantine* (for the prisoner) asked the witness, on cross-examination, whether she had ever made such a statement before.

*Bodkin* (for the prosecution) submitted that the question in that form could not be put, as it included what was said before the magistrate. Whether the witness made the statement or not would appear by the depositions, and they ought to be shown to her, and then she might be asked as to any omissions.

*Ballantine* contended that he had a right to put the question; he simply asked whether she had made the statement before; he did not seek to learn what she said before the magistrate, nor could he avail himself of any variance between her statement then and now, without putting in the depositions.

ALDERSON, B. (after consulting CRESSWELL, J.)—We are of opinion that the question may be put. No doubt, if the object is to contradict a witness, or to elicit what was said before the magistrate, the depositions must be put in; but when they are in they will not prove whether or not such a statement was made. At the utmost, they could only show that they did not contain it.

*Bodkin* and *Clerk* for the prosecution.

*Ballantine* for the defence.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

## CENTRAL CRIMINAL COURT.

SEPTEMBER SESSION.

*September 19, 1850.*

(Before the COMMON SERGEANT.

REG. v. COLE.(a)

*Larceny—Allegation of ownership of partnership property.*

*On an indictment for larceny of notes and money from the person, it appeared in evidence that one partner of a firm resided in this country, and the other partner was permanently settled in Belgium. The partner residing here had the sole management of the partnership property, and the banking account was in his name. The notes and money alleged to have been stolen were the joint property of the firm.*

*Held, that the property was rightly alleged to be in the partner resident here.*

THE prisoner was indicted for stealing from the person of Peter Thwaites one canvass bag, two bank notes, each for the payment of 100*l.*, one note for the payment of 5*l.*, and twenty sovereigns, the property of the said Peter Thwaites.

On cross-examination the prosecutor stated that he was a fruit salesman in Covent Garden, that he was in partnership with a person named Isaacs, who resided in Belgium, and that the notes and money which had been stolen from him were partnership property; that shortly before the larceny was committed he had put the notes in his pocket for the purpose of obtaining bank post bills to be sent to his partner in Belgium, that they might be used in the partnership business; that the sovereigns were the produce of a cheque drawn by him upon a bank in which the partnership moneys were deposited, but the account was in his name alone. The money was drawn out for the purpose of being used in the business of the firm, but some portion of it would probably have been employed in his own private disbursements. He considered himself responsible to his partner for the sum which had been stolen from him. The notes and the money were in a canvass bag at the time when they were stolen from him, and the bag was one of several which were used in the joint business.

*Parry* (for the prisoner), upon this evidence, submitted that the indictment laying the property in the prosecutor alone, could not

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

be sustained. The prosecutor had not only stated that the property belonged to the partnership, but all the circumstances he had detailed respecting the ownership, tended to confirm that proposition in point of law.

REG. v. COLE.  
Larceny.

*Robinson* (for the prosecution) contended that the property was rightly laid. The fact of there being a joint ownership was quite consistent with there being such a property in the prosecutor, as would support a count alleging it to be in him. He had the sole management of all the partnership funds, the banking account was in his sole name, and he was invested with a special trust which gave him the character of a bailee with respect to the partnership property.

The COMMON SERGEANT was at first inclined to hold that the property was wrongly laid, but on consulting Mr. Justice Talford, who was in the adjoining court, he held that the allegation of ownership was sufficient, the prosecutor having a special and individual trust of the joint property.

## COURT OF QUEEN'S BENCH.

July 6, 1850.

### REG. v. THE INHABITANTS OF THE ISLE OF ELY.(a)

*Statute of Bridges—Liability to repair—Shire, riding, or division—Public user—Bridge rendered necessary by an act interfering with a public right.*

*The Isle of Ely is a riding or division of a county within the Statute of Bridges, and its inhabitants are primarily liable to the repair of public bridges within it.*

*The Corporation of the Bedford Level, for the purposes of drainage, had, in 1632, cut a drain across a public highway, and built a bridge to carry the highway over the drain. The drain, its banks, and the bridge, were vested in the corporation :*

*Held, that as the act of cutting a drain rendered a bridge necessary, and that act was done primarily for private purposes, there was a continuing obligation on the corporation to maintain that bridge : and that its public utility did not throw the burden of repair upon the inhabitants generally.*

**T**HESE were two indictments for the non-repair of two bridges; to which the defendants had pleaded specially, setting up the

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.



REG.  
v.  
INHABITANTS  
OF  
ISLE OF ELY.

*Repair of  
bridges.*

Indictment.

liability of the Corporation of the Bedford Level. The 1st count of the indictment as to the old Bedford Bridge was as follows:—

The jurors of our Sovereign Lady the Queen upon their oaths present that a certain common and public bridge situate and being in the parish of Mepal, in the Isle of Ely, and county of Cambridge, over a certain river there called the Old Bedford River, and on a certain Queen's highway there for all the liege subjects of our said Lady the Queen, with horses, carts, and carriages, to go, pass, ride, and travel over at their pleasure, heretofore, to wit, on the 1st day of June, in the year of our Lord 1844, was, and continually from thenceforth hitherto hath been, and still is in great decay, broken down and ruinous, so that the liege subjects of our said Lady the Queen, upon or over the said bridge with their horses, carts and carriages, could not, and cannot pass, ride, and travel without great danger, to the grievous damage and common nuisance of all the said liege subjects of our said Lady the Queen, upon and over the said bridge going, passing, riding, and travelling, and against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity; and that the said bridge is not within any city or town corporate, and that the inhabitants of the Isle of Ely aforesaid, the bridge aforesaid (so as aforesaid being in decay), ought to repair and amend when and so often as it shall be necessary, according to the form of the statute in such case made and provided.

Plea.

Plea to the 1st count:—

William Goddard Jackson and Edward Osborn Dyson, two of the inhabitants of the said Isle of Ely, in the said county of Cambridge, in their proper persons, on behalf of themselves and the rest of the inhabitants of the said Isle of Ely (except the corporation of the Governor, Bailiffs, and Commonalty of the Company of Conservators of the Great Level of the Fens), come and having heard the said indictment read, say as to the 1st count of the said indictment that our said Lady the Queen ought not further to proceed against the said inhabitants of the said Isle of Ely (except as aforesaid), by reason of the premises in the 1st count of the said indictment specified, because they say that the said Old Bedford River in the said 1st count of the said indictment mentioned, was and is situated within the said great level of the fens now commonly called the Bedford Level, and was and is an artificial drain or river, and that the same was long heretofore, to wit, on the 1st of January, A.D. 1632, and at the said parish of Mepal, in the said county of Cambridge, cut and made by certain persons, to wit, one Francis Earl of Bedford and certain other adventurers, for the purpose of draining the great level of the fens, since deceased, whose names are to the said, &c., unknown, then being the owners of divers large quantities of land within the said great level of the fens then requiring to be drained of water, and for the purpose of draining the said great level of the fens and the said large quantities of land, parcel thereof, so vested in them as aforesaid, and

or their own use, benefit, profit, and convenience, and for the furthering of the purposes of the said adventurers, and under and by virtue of certain powers and authorities vested in them, by and under certain commissions of sewers theretofore granted, and certain other powers and authorities in them vested; and that the said Earl and the said adventurers, under the powers and authorities aforesaid, long heretofore, to wit, on the day and year last aforesaid, and in the parish and county aforesaid, constructed and erected the said bridge, in the said 1st count of the said indictment mentioned, upon and over the said drain or river so before then made by them in manner and for the purposes aforesaid, and not upon the ancient course or channel of any stream or river, no bridge being there before or required there until the making of the said drain or river by the said Earl and the said adventurers aforesaid. But the said drain or river having, at the time of the making of the same, intersected and interrupted, and rendered wholly impassable a certain public highway existing at the time of the making of the said drain or river in and along the line of the said bridge, to wit, in the parish and county aforesaid, and on which highway, from time whereof the memory of man ran not to the contrary, until the making of the said drain or river, all the subjects of the kings of this realm had been used and accustomed as of right to pass and repass with their cattle and carriages at all times of the year, at their free will and pleasure, and it having thereupon and thereby become the duty of the said Earl and the said adventurers to construct and erect a bridge over the said drain or river, the said bridge in said 1st count of the said indictment, and hereinbefore mentioned, was by them erected and constructed as aforesaid, in the same place where the said highway, before the making of the said drain or river, was and had been for all the time last aforesaid, and as a convenient, fit, and usual means of passage for the subjects of the kings of this realm, with their cattle and carriages in, over, and along the said portion of the said highway so intersected and interrupted by the said drain or river as aforesaid, and to enable them to pass and repass as aforesaid in, over, and along the said portion of the said highway as they otherwise might, would, or ought of right to have done. And the said W. G. J. and E. O. D. further say, that from and after the alteration of the said highway in manner and to the extent aforesaid continually hitherto, the said highway has been carried, and has gone, and is now carried, and now goes, unto and over the said bridge. (The plea then set out the provisions of the act of Parliament incorporating the adventurers by the title of the Governor, Bailiffs, and Commonalty of the Company of Conservators of the Great Level of the Fens, 15 Car. 2, c. 17.) It then proceeded to allege that before and at the time of passing the said act the said bridge existed and formed part of the works of the Bedford Level, and had been theretofore until the act maintained (there being no agreement to the contrary) by the adventurers; that the said cut or drain had been beneficial and useful to the adventurers from and since the making

REG.  
v.  
INHABITANTS  
OF  
ISLE OF ELY.  
  
*Repair of  
bridges.*

Plea.

REG.  
v.  
INHABITANTS  
OF  
ISLE OF ELY.  
—  
*Repair of  
bridges.*

thereof, and useful to the corporation from and since its creation, and for drainage; and that from and after the passing of this act and thence hitherto, the cut or drain and the banks and bridge have been vested in the corporation, and the said corporation have maintained and still maintain the said cut or drain and banks for their own profit as owners thereof, and of the said lands so vested in them by the act, and for the purposes of the corporation, and the drainage of the fens; and that during all the time aforesaid, the said corporation have continued and maintained and repaired and amended the said bridge, and ought so to do, as often as required, by reason of their being the owners of the lands, and by reason of the premises; and that the inhabitants of the Isle of Ely, except the members of the corporation, ought not to repair or amend as in the indictment mentioned. Concluding with a verification and prayer of judgment. Demurrer thereto. It is unnecessary to set out any other portion of the pleadings.

The case was argued during Michaelmas vacation, 1848 (Friday, December 8, and Saturday, December 9) before Lord Denman, C. J., Patteson J., and Coleridge, J.

Argument for  
the crown.

*Biggs Andrews* (with him *Byles*, Serjt. and *Wells*), in support of the demurrer.—1. The indictment is good, because the Isle of Ely is to be regarded as a “shire or riding” within the Statute of Bridges. That statute applies to any legalised division of a county; for the statute of Anne (1 Anne, stat. 1, c. 18) uses the word “divisions” as synonymous with ridings; and the Statute of Bridges is in affirmation of the common law: (2 Hawk. lib. 1, c. 32; 2 Inst. 701; *R. v. The West Riding of Yorkshire*, 2 East, 350.) Therefore, no special allegation of the ground of liability is necessary; and the indictment is similar in form to the precedents of indictments against the ridings of Yorkshire, or the parts of Lindsey or Holland, in the county of Lincoln: (*R. v. Lindsey*, 14 East, 317.) Nor was it necessary to allege that the bridge had existed from time immemorial; for even new bridges are to be repaired by the county, if the public use them: (*R. v. The West Riding*, 2 East, 342; *R. v. Glamorganshire*, *id.* 356, n.) *R. v. Lindsey* was the case of a new bridge. [PATTESON, J.—If the Isle of Ely is a riding or division, to which the common law liability would attach, then the question, whether the bridge has existed immemorially, becomes unimportant.] Nor is the indictment bad because it does not allege that the bridge was used by the public as of right, for it lays the want of repair to be *ad commune nocumentum*; and that is enough: (1 Ventr. 208; Say. 168, cited 3 Chit. Cr. Law, 570.) The next objection to the indictment that there is no allegation that it is not known what hundreds are liable, is equally futile. The Statute of Bridges refers to that; but the primary liability at common law is on the county, and the statute imposes no new liability. The allegation does occur in some old precedents, but has long been omitted. Lastly, as to the indictment, there was no necessity to refer to the statutes, because the Isle of Ely is in the situation of a county, and is rendered liable by the general law:

(7 Will. 4, and 1 Vict. c. 53, s. 7.) Secondly, assuming the Isle of Ely to be *primâ facie* liable, the burden is cast upon the inhabitants of showing their exemption. A county is not exempt merely because the bridge has been recently built, nor because it was built by private individuals for their own convenience, and not by the county, if it is used by the county at large. [COLERIDGE, J.—Except under the last statute.] By the 43 Geo. 3, c. 59, s. 5, it is prevented from becoming a public bridge unless substantially built; but that would be evidence under not guilty. Here the *primâ facie* liability is admitted, but answered by showing other persons liable: (He referred to *R. v. The West Riding of Yorkshire*, 2 East, 351; *R. v. Glamorganshire*, 2 East, 356, n.; and *R. v. Kent*, 2 M. & S. 513.) The only exception is where the bridge has been built by trustees for their own benefit under an act of Parliament, which provides funds for its repair, or where the county is specially exempted: (*R. v. Oxfordshire*, 4 B. & C. 194.) The cases of *R. v. Kent* (13 East, 220); *R. v. Lindsey* (14 East, 317); and *R. v. Kerrison* (3 M. & S. 526), are quite distinguishable. This special plea shows no exemption. First, it shows no liability in the adventurers; it does not show what powers the adventures had, nor what was the authority given by the commission of sewers under which they acted. [COLERIDGE, J.—The adventurers made the river across a public way, and so the bridge was rendered necessary by their works: that is like *R. v. Lindsey*.] The county says that a third person is liable, because he built the bridge under certain special limited authorities, without showing what they were. [COLERIDGE, J.—The defendants may not know what those powers were; and suppose even that the adventurers exceeded those powers, still, if their works rendered the bridge necessary, they would be liable to repair it.] In *R. v. Lindsey*, *R. v. Kent*, and *R. v. Kerrison*, the cut was set out, and power to build the bridge expressly given. [LORD DENMAN, C. J.—The corporation of the Bedford Level is authorized to “amend and repair all bridges, and the same, if need be, to make new:” (*renovare*.)] If an individual cuts through a highway unlawfully, he should be indicted for a nuisance; if he builds a bridge lawfully, then he may be indicted for non-repair; but if he builds a bridge unlawfully, and the public, instead of indicting him for a nuisance, choose to use it, they are bound to repair it. Secondly, even if the adventurers are shown to have been liable, the corporation of the Bedford Level are not shown to be so. [COLERIDGE, J.—It is said that the act of Parliament vested this bridge in the corporation.] If so, the plea is bad, because it sets up two things: first, a liability by reason of the building of the bridge; secondly, a liability by reason of its being vested in the corporation. The plea ought, at all events, to show that the corporation have funds out of which they can repair the bridge. They may raise money by taxation for the support, maintenance, and preservation of the works of the Great Level, but that applies to drainage works, and there is nothing to point to any such work as the bridge in question. If there had been an allegation that

REG.  
v.  
INHABITANTS  
OF  
ISLE OF ELY.  
  
Repair of  
bridges.

Argument for  
the crown.

REG.  
v.  
INHABITANTS  
OF  
ISLE OF ELY.

1850.

*Repair of  
bridges.*

Argument for  
the defendants.

this bridge formed part of the works for the drainage of the Great Level, it might have been traversed, but there is no such allegation, and the court cannot assume that the corporation has any power to impose a tax for the repair of this bridge. With reference to another part of the act of Parliament the plea does allege that the bridge formed part of the works of the Great Level (not saying for drainage), maintained by the adventurers; but that part of the act of Parliament relates only to the power of the commissioners to require the corporation to make good any damage done by them to bridges over navigations; and points out a particular way of doing the repair. *Non constat* that the corporation could raise funds to meet the general repairs of this bridge: (*R. v. Netherthong*, 2 B. & Ald. 179; *R. v. The Trustees of the Witney Roads*, 12 Ad. & El. 428; *R. v. Oxfordshire*, 4 B. & C. 197.) This latter part of the act is important, however, as showing that bridges are not included in the general term "works" which is used in the first part. If they were, the latter limited provision as to bridges would be unnecessary. In some cases it has been said that the county is always liable in such cases unless expressly excepted; and that perhaps is the best rule; for the county can afterwards enforce its rights against other parties, if there are others liable to contribute or to indemnify the county. Lastly, a plea setting up the liability of others should not traverse the liability of defendants. It is traversing matter of law: (*R. v. Stoughton*, 2 Saund. 159, c.)

*Maude*, contra.—First, the plea is good; if not, at all events the indictment is bad. The plea shows, first, the liability of the adventurers; and the transfer of that liability to the corporation. It also shows an independent liability in the corporation; and if it is on that account double, the objection cannot be taken on general demurrer. 1. It may be admitted that the mere circumstance of a bridge being built by a private individual for private purposes is not enough to exempt the county from the liability to repair if it is used by the public; but if the bridge is necessarily substituted for an old highway which has been interrupted, then the county is not liable. That reconciles all the decisions: (Com. Dig. Chemin, B. 2; 1 Roll. Abr. 368, "Bridges," pl. 2.) In *R. v. Kent* (2 M. & S. 519), the authority of the passage in Roll. Abr. is questioned; but upon insufficient ground. The record set out in 2 M. & S. 520, is 6 Edw. 2; that referred to in Rolle is 8 Edw. 2. A reference to the records does not show at all events that no such point was decided as is mentioned in Roll. Abr. There is a short abstract of a record "Hil. T. 8 Edw. 2," which may be the case referred to. All the cases cited on the other side are cases in which there has been some gain to the public; either a bridge has been substituted for a ford, or a more commodious bridge built. Here the public gets nothing. The bridge is substituted for the old highway: (*R. v. Kerrison*, *R. v. Lindsey*, *R. v. Kent*, *R. v. Glamorganshire*, cited *supra*.) In 1 Bac. Abr. "Bridges," p. 787, there is a rather different report of *R. v. Glamorganshire*; and it is said a public bridge must be of "public conveniency," and for

"common good." (He also referred to *R. v. The West Riding*, 5 Burr. 2594; *R. v. The West Riding*, 2 Bl. 685; *R. v. Bucks*, 12 East, 192; *R. v. Lancashire*, 2 B. & Adol. 813; 2 Wms. Saund. 161, n.) The adventurers, therefore, are shown to have been liable to repair the bridge; and the statute (15 Car. 2, c. 17) transfers the liability to the corporation. That is a public act of Parliament: and the court, therefore, may take notice of any part of it, though not set out in the plea: (Bac. Abr. "Statute," F.) The statute gives the corporation the right to tax for the maintenance of all the works connected with the drainage of the Great Level; and they are required to amend all ways and bridges which are impaired by their works, and are vested in them. The corporation here made a legislative bargain with the public, and are bound by it. This very bridge is vested in the corporation; how then could the defendants repair it? They would be trespassers. The intention of the Legislature obviously was to throw the liability on the corporation. Whether the adventurers acted under sufficient authority in cutting the drain is immaterial; for if they were trespassers the same conclusion would follow; and at all events the defendants cannot be expected to set out the authorities under which the adventurers acted; the corporation being the real prosecutors: (2 Wms. Saund. 410; Steph. Pl. 310.) But the recital of the statute does show the authority under which the works had been commenced. It is shown that the adventurers had repaired, and that the corporation was to repair what the adventurers had repaired. It is not necessary to show that the corporation have funds. If the view which the defendants take of the law is correct, then this is like a case of liability, *ratione tenuræ*, in which it is never necessary to show the possession of funds or the ability to repair. The obligation runs with the land: (*R. v. The Eastern Counties Railway Company*, 10 Ad. & El. 531; *R. v. The Luton Roads Trustees*, 1 Q. B. 860; *R. v. The Clerkenwell Improvement Commissioners*, 12 L. T. 241.) Here the corporation are shown to be still in possession of the lands originally given for the purposes of the drainage. At all events the want of funds is a matter to come from the other side. The plea is in form correct, and according to precedent, both in alleging that the corporation of right ought to repair, and also in traversing the alleged liability of the county: (4 Chit. Cr. L. 556; *R. v. Kent*; *R. v. Lindsey*; *R. v. Ecclesfield*, 1 B. & Ald. 348; *R. v. Nottingham*, 2 Lev. 112.)

The objection that the plea is double is not open upon general demurrer: (1 Chit. Pl. 663.) [*Andrews*.—Stat. 27 Eliz. c. 5, does not apply to criminal pleading: (4 Chit. Cr. L. 517.)] But the plea is not double. Nor is the plea bad because it does not allege an immemorial liability on the adventurers. It is wholly different from a plea of liability *ratione tenuræ*, which implies an immemorial liability. Here the case of the defendants negatives such a liability: (*R. v. Stoughton*, 2 Wms. Saund. 158, d; *R. v. Hayman*, M. & M. 401; *R. v. Kerrison*, 1 M. & S. 435.) But if the plea is bad, so is the indictment.

Now as to the indictment, great certainty is required: (1 Chit.

REG.  
v.  
INHABITANTS  
OF  
ISLE OF ELY.  
—  
1850.  
—  
Repair of  
bridges.

Argument for  
the defendants.

REG.  
v.  
INHABITANTS  
OF  
ISLE OF ELY.  
—  
1850.  
—  
*Repair of  
bridges.*

Argument for  
the defendants

Cr. Law 172; *Beech's case*, 1 Leach C. C. 158.) None of the statutes of jeofails and amendments apply to criminal cases; and pleading over only cures an objection by supplying the omission which is the ground of it: (1 Chit. C. L. 666.) Here there is nothing to show that the inhabitants of the Isle of Ely are liable to repair this bridge; if so, the indictment does not properly charge the liability. [LORD DENMAN, C. J.—How was it done in *R. v. Lindsey?*] That was a common form. The three divisions of Lincolnshire are ancient, well known divisions, and may be equivalent to “ridings,” which are mentioned in the Statute of Bridges. A mere ordinary division of a county cannot be indicted in the common form as a riding may: (*R. v. Sheffield*, 2 T. R. 106; *R. v. Great Broughton*, 5 Burr. 2700.) The stat. 7 Will. 4, and 1 Vict. c. 53, s. 7, cannot have the effect of applying the Statute of Bridges to the Isle of Ely, unless it applied before. It imposed no new liability upon the Isle of Ely and removed no old one. If the Isle of Ely is indictable, so is the liberty of Ripon and other similar districts. The word “riding” is said to have been introduced to meet the case of Yorkshire (2 Inst. 702); and that is a very different case. The stat. 6 & 7 Will. 4, c. 87, in several sections treats the Isle of Ely as part of the county of Cambridge: (s. 8, s. 15.) No charge of liability is contemplated by the particular statutes relating to the Isle of Ely; and the county of Cambridge may be indictable though the Isle of Ely is bound to contribute. He referred to *Evans q. t. v. Stevens* (4 T. R. 462; 1 Bl. Com. 117, Ed. Col.; 2 Inst. 701); *R. v. Netherthong* (2 B. & Ald. 179.) Independently of the statutes, it appears not to have been a county palatine, but a royal franchise only (4 Inst. 220); and the repairs of bridges have been done not by the inhabitants but by the large ecclesiastical houses within it: (Lysons' *Magna Britannia*.) The ancient machinery of levying county rates would not be applicable to such a district as the Isle of Ely: (*R. v. Pennegoes*, 2 B. & C. 166; 23 Hen. 6, c. 10.) 2. The indictment is bad for not showing that the bridge was used *of right*. This is a departure from the usual form; and the bridge may have been usable at particular periods only. An obstruction to be indictable must be a nuisance to the public, and would not be a nuisance if it existed only at a time when the public had no right to go: (Archb. Cr. Pl. 652; *R. v. Northampton*, 2 M. & S. 262; *R. v. Buckingham*, 4 Campb. 189; *R. v. Devonshire*, Ry. & M. 144.) Lastly, the indictment does not contain the usual negative averment, that it cannot be known and proved that any hundred, &c., is liable to repair: (2 Inst. 703; *R. v. Essex*, Trem. P. C. 205.)

*Andrews* in reply.

*December 9.*

The second case was argued by *Peacock* for the defendants, and *Biggs Andrews* for the Crown; but as the points were the same it is not considered necessary to give any further report. *R. v. New Sarum* (7 Q. B. 941), was the only additional case cited.

*Curr. adv. vul.*

## JUDGMENT.

PATTESON, J.—These were indictments against the inhabitants of the Isle of Ely, for the non-repair of two bridges, the one over the old Bedford river, the other over the new Bedford river, or One Hundred Feet river. They were in the same form, and the two counts in each varied from each other only in this, that one charged the bridge as being on a certain Queen's highway, the other as being a common Queen's highway. The counts state the bridges respectively to be in the parish of Mepal, in the Isle of Ely, in the county of Cambridge. They negative their being within any city or town corporate, and simply allege, without showing why, that the inhabitants of the isle ought to repair them when and so often as shall be necessary, according to the form of the statute. There is a special plea to each count to which the Crown has demurred specially; but as upon the argument before us objection has been made to the indictment, it would be more convenient to dispose of that before stating or considering the validity of the pleas. The objection substantially relied on is, that the inhabitants of the Isle of Ely are charged with the duty of repairing, without showing the grounds on which such obligation is rested. The indictments state that the bridges respectively are situate in the parish of Mepal, in the Isle of Ely, in the county of Cambridge; and they are stated to be ruinous, against the form of the statute, and not within any city or town corporate; and then it is alleged that the inhabitants of the Isle of Ely ought to repair and amend, when necessary, according to the form of the statute. The general principle on which the objection rests was not disputed, but it was alleged that it did not apply in fact, because the Isle of Ely was to be judicially considered in the same light as a riding or division of a county, and so the inhabitants were chargeable of common right. The Statute of Bridges, 22 Hen. 8, c. 5, s. 1, which declares the common law liability as to the repair of public bridges, uses the words "shire or riding;" the statute of Anne, st. 1, c. 18, s. 1, professing to recite it, uses the terms "counties, shires, ridings, and divisions," and as the first two words are clearly intended to be used synonymously, the same intention seems to us quite clear as to the last two, and the inference is, that in the first statute the word "riding" is not to be restrained to districts called by that name, but that any division of a county which corresponds in its definition to that of a riding is to be included within it. Now it appears from the 6 & 7 Will. 4, c. 87, that the Isle of Ely has a separate commission, and clerk of the peace, a separate county rate, and that Her Majesty may appoint a separate *custos rotulorum*. This statute, however, left its legal denomination uncertain; for, consistently with all these circumstances, it might have remained for some purposes merely a parcel of the county of Cambridge; but by the 7 Will. 4 and 1 Vict. c. 53, s. 7, it is enacted, "that whereas doubts have arisen whether the Isle of Ely is included in enactments made in several statutes respecting counties, ridings, or

REG.  
v.  
INHABITANTS  
OF  
ISLE OF ELY.  
—  
1850.  
—  
*Repair of  
bridges.*

Judgment.



REG.  
v.  
INHABITANTS  
OF  
ISLE OF ELY.

1850.

*Repair of  
bridges.*

Judgment.

divisions, under such statutes theretofore passed or thereafter to be passed the Isle of Ely shall be deemed and taken to be a division of a county." The word "division" here cannot be reasonably understood merely of a division for the purpose of holding special or petty sessions, and being used with reference to a district having a separate *custos rotulorum*, magistracy, clerk of the peace, quarter sessions, and county rate, it must be understood in that larger sense in which it is equivalent to riding. It is therefore within the statutes of 1 Anne, stat. 1, c. 18, and of Hen. 8; and, if so, the common law obligation must be held *primâ facie* to apply to its inhabitants. We think, therefore, the objection to the indictment fails. It may be better, in considering the pleas, to take that to the 1st count, in respect of the old Bedford river bridge, separately. The plea to the 1st count, which is in behalf of the rest of the inhabitants, except the corporation of the Governor, Bailiff, and Commonalty of the Company of the Conservators of the Great Level of the Fens, states that the old Bedford river is an artificial drain or river within the said great level, commonly called the Bedford level; that it was made for the purpose of draining the great level by adventurers, owners of land within the level, for their own benefit and convenience, and under certain powers vested in them by the commissions of sewers before then granted, and other powers in them vested; and that under the same powers they erected the bridge in question over the said drain, and not upon the ancient course of any stream or river, no bridge being there before, or required there; but the said drain having, at the time of making it, intersected and rendered wholly impassable a certain public highway then existing, over which, immemorially until the time of the making of the drain, all the liege subjects had used to pass as of right with their cattle and carriages at all times; and it therefore having become the duty of the adventurers to construct a bridge, the said bridge was by them constructed where the highway had been; and that from and after the alteration of the highway in manner and to the extent aforesaid, the said highway had been carried, and is now carried upon, and goes over the said bridge. The plea then goes on to state that after the making of the said drain, and construction of the said bridge, the said corporation was created by act of Parliament, and the said drain or river, its banks, the said bridge, and divers large quantities of land, parcel of the said great level, being the same which the adventurers were before mentioned as being the owners of, and for the purpose of draining which the said drain was made, were vested in the said corporation. The plea then sets out the recitals and clauses of the act of Parliament, by which it appears that the Earl of Bedford was to have 95,000 acres of the grounds to be drained for his recompense, with convenient highways and passages to the same, and the new rivers, cuts, and drains which should be made, and the banks and the forelands in the inside thereof, not exceeding sixty feet in breadth; and that the corporation were empowered to lay and levy taxes on the 95,000 acres only for the support,

maintenance and preservation of the level, and to do all other things in order to the support of the same, and the works made or to be made; and that 83,000, part of the 95,000 acres, with the said ways, passages, new rivers, cuts, drains, banks, and forelands, the said old Bedford river, with the banks thereof included, should be thereby vested in the said corporation, in trust, nevertheless, for the said Earl and adventurers in fee. The plea then shows that by the said act a certain court of commissioners was created for hearing and determining complaints occasioned by the draining and maintaining of the level; or in case the adventurers or the corporation should do any act to the prejudice of the local navigation, or whereby such drove ways or bridges within or without the said level as had been made by the adventurers, and had been maintained by them, should be interrupted, obstructed, and made worse, such obstructions and injuries should be removed, and repaired at the cost of the corporation; and, in case of their failure, by taxation of the said 95,000 acres, and the money so raised to be expended in preserving and keeping the said navigation, and maintaining the same according to the true intent and meaning of the said act of Parliament. The plea then alleges that the said bridge having been erected and rendered necessary as aforesaid, formed part of the works of the said great level, and had been, continually to the passing of the act, maintained by the said adventurers: that the drain had been and is very useful to the adventurers and corporation respectively for the draining of the great level, and has been and is maintained for their own use and benefit, and for the furthering of their purposes; and that since the act of Parliament the drain, together with the banks thereof, and the bridge, have been respectively vested in the said corporation, and the corporation has maintained and continued the drain and the banks, and still do, for their own use and benefit as the owners thereof, and of all the lands vested in them, and for the furthering the purposes of the said corporation, and during all the time aforesaid, have continued and maintained the said bridge, and repaired the same, and been liable to and of right ought to have repaired the same, and still of right ought so to do by reason of the premises in the plea respectively mentioned and referred to. As the 1st count has shown the defendants liable *primâ facie*, the question on this plea will be, whether it shows any other parties really liable; unless it does, the *primâ facie* liability will not have been displaced. Now, the plea shows a highway interrupted, and an artificial drain or river made across it for the use, profit, and advantage of the adventurers; the necessity for a bridge thereby created, and the bridge in consequence constructed on the line of the former highway by them, and the former highway thenceforward and now carried upon the bridge. It then states the creation of the corporation by act of Parliament, whom it afterwards identifies with the adventurers in the relation of trustees and *cestui que* trust; and it alleges, that by the same authority the drain or river, with its banks, the bridge, and a large quantity of land, for the purpose of draining which the

REG  
V.  
INHABITANTS  
OF  
ISLE OF ELY.  
1850.  
Repair of  
bridges.

Judgment.

REG.  
v.  
INHABITANTS  
OF  
ISLE OF ELY.

1850.

*Repair of  
bridges.*

Judgment.

drain had been made, were vested in the corporation. To go no further with the plea, the facts now stated seem to us to distinguish this case from many that were relied on in the argument for the Crown. The general rule may be considered to have been established with regard to bridges built before the 43 Geo. 3, c. 59, at least from the time of *Rex v. The West Riding* (5 Burr. 2598), by the words of Aston, J., that "if a man builds a bridge, and it becomes useful to the county in general, the county shall repair it." In the case by the same name in 2 East, 342, this rule was held to apply to the case of a bridge first built by the trustees of a turnpike road, where no bridge had been before, over a natural rivulet: the bridge was of public utility, and Lord Ellenborough assumed that the trustees had authority to build it, and they had power to levy tolls for the repair of the road, but there were no funds specifically provided for the repair of the bridge, and the trustees were not personally liable. Where, however, a navigation company were authorized to take or alter the old highway for their own purposes, only upon condition of leaving another as good in its room, and the company, deepening a ford which had been a highway, so as to render it impassable, had made a bridge necessary, and accordingly built it, this court held the condition to be a continuing one; that the company were bound permanently to keep the highway as good for the public, and so to keep the bridge, which was the substituted highway, in repair (*Rex v. Kent*, 13 East, 220); and though there are some slight differences between the facts of that case and those of *Rex v. Lindsey* (14 East, 317), yet the principle of decision was substantially the same, and the latter may be considered a full confirmation of the former decision. These cases proceeded on the particular circumstances of each respectively, as is manifest from the judgment of the court in *Rex v. Kent* (2 M. & S. 513), where individuals had, for their own profit, erected a mill, deepened a ford and highway in a part of the stream above it, so as to render it impassable, and then, in discharge of the consequent duty, erected a bridge over the stream at the same place, which thenceforward they had repaired. There the court held that the general rule applied. There was neither prescription nor reason of tenure to fix the burthen on the mill-owner, and by reason of this and the public utility of the bridge, the county was bound to repair. This case, of course, was much pressed on behalf of the Crown, and on behalf of the defendant this authority was questioned. Lord Ellenborough, in delivering the judgment, seems to admit that that was a decision contrary to the case in 1 Rolle's Abridg. 368, "Bridges," pl. 2, but states, that on reference to the record, Rolle appeared not to have been warranted in the abstract given by him; indeed that no such question, as he supposed, had been raised or decided in it. Considering the great learning and accuracy of Rolle, and the greater familiarity which he undoubtedly had with ancient records than could be expected of the court in Lord Ellenborough's time, so entire a blunder as is charged upon him may well excite surprise, and it was pointed out by Mr. Maude,

for the defendants, that whereas Rolle refers to a record of the 8 Edw. 2, the roll examined by the court (from which an extract is given in 2 M. & S. 520) is of 6 Edw. 2, and the result of his industrious research leaves it very questionable whether the court, in *Rex v. Kent*, did successfully dispose of the authority in Rolle, who, it is to be observed, adds to his citation, "and it is now repaired by London which hath the mill," speaking of it, we apprehend, as a fact within his own knowledge, and certainly attributing the continued repair by the city of London to their ownership of the mill. I should say, on looking further into it, that it does appear there were some proceedings in the 6 Edw. 2, certainly, on the subject, and there were other proceedings, it seems, in the 8 & 9 Edw. 2, and some confusion might very likely result from this. It would be safer, therefore, perhaps, to rely neither on the case in Rolle nor on the mere decision in *Rex v. Kent*, further than as a general affirmance of the general rule: but in a later case, that of *Rex v. Kerrison* (3 M. & S. 526), where a navigation company, for the purposes of the navigation, and by virtue of their statutory power, made a navigable cut across a highway, rendering it impassable; and a bridge was built across the cut (it was not proved by whom), neither necessary or useful to the navigation, but from time to time repaired by the company, necessary to the public, and used by the public, but never repaired by the county: the court held that the owners of the navigation were liable to the repair, though no tolls were paid in respect of passing the bridge, and no funds for its maintenance were distinctly found to exist; and they proceeded on the same principle which had decided the cases in 13 & 14 East. That principle seems to be this—undoubtedly a just one—that where the act making the bridge necessary, though authorized to be done, interferes with a public right, and is done primarily for private purposes and the public user, from which the public benefit is inferred, is to be referred only to the act, because made necessary by it, the public, indeed, having only the same convenience which they had before, the authority to do the act is conditional only, equally whether the condition be expressed or implied; and the condition also is in both cases continuing, so long as the act continues whereby the public right is interfered with; and as the obligation here insisted on arises from the party's own act, which would be unlawful unless such obligation were complied with, the case steers clear of any consideration as to the existence of funds, for the party bringing the duty upon himself for his own purposes cannot object the want of funds for the performance of it. It appears to us that when the adventurers first cut the drain, and interrupted the public highway, that act, however authorized by Commissions of Sewers, or other powers vested in them, was done for their own use, benefit, and convenience, and could be legal only on the condition of substituting another highway, which could be only by a bridge, as convenient for the public as the old one; and that public were, in truth, no gainers by the change; they were, by the hypothesis, merely

REG.  
v.  
INHABITANTS  
OF  
ISLE OF ELY.  
—  
1850.  
—  
Repair of  
bridges.

Judgment.

REG.  
v.  
INHABITANTS  
OF  
ISLE OF ELY.  
—  
1850.  
—  
*Repair of  
bridges.*

placed in the same situation as before, and the condition which was necessary to legalize the first cutting of the drain was and is a continuing one; the instant it is broken the indefeasible rights of the public revive, and the cut becomes a nuisance. We think, therefore, that the plea is in substance good, and that the facts it discloses clearly distinguish it from the case *Rex v. Oxfordshire* (4 B. & C. 194), where the bridge was built by the trustees of the turnpike road for public purposes only. There is another fact in this case which does not appear distinctly found in any of the decided cases, namely, that the cut, the banks, and the bridge, are all expressly vested in the corporation by statute, and this is relied on by the counsel for the Crown as making the plea double. But we think it is not set up, nor could be, as alone, of power to throw the liability on the corporation, and therefore that it does not open the plea to the objection of duplicity; at the same time we by no means say that it is an unimportant fact in addition to the others on which we mainly rely. The ground on which we decide as to this plea makes it unnecessary to consider some other objections which applied to other parts of it than those on which we rely. No distinction was made between the second and first plea, and our judgment will be for the defendants as to the old Bedford river bridge. The same judgment will be given in the second indictment.

*Judgment for the defendants.*

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### COMMISSION OF OYER AND TERMINER, AND GENERAL GAOL DELIVERY FOR THE COUNTY OF THE CITY OF DUBLIN.

*December 23, 28, and 29, 1848, and January 4, 1849.*

(Before PERRIN, J., and RICHARDS, B.)

REG. v. CHARLES GAVAN DUFFY.

*Indictment—Demurrer—11 & 12 Vict. c. 12—Duplicity—Overt acts—Inuendo—Repugnancy—Allowing demurrer as to a part of a count.*

*The prisoner was indicted in six counts under the statute 11 & 12 Vict. c. 12. The 1st count charged that he, on the 3rd day of June, feloniously did compass, &c., to deprive and depose our Lady the Queen, from the style, honour, and royal name of the imperial crown of the United Kingdom; and the said felonious compassing, &c., then and*

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

there feloniously did express, utter, and declare, by then and there feloniously publishing a certain printing in a certain public newspaper called "The Nation," which said printing is entitled "The Business of To-day," and contains among other things, according to the tenor and effect following, that is to say, &c. (setting out a portion of the article,) and in another part thereof according to the tenor and effect following, that is to say, &c. (setting out another portion of the same article.) And the said felonious compassing, &c., he the said Charles Gavan Duffy afterwards, &c., on the 17th day of June, in the said 11th year, &c., did further feloniously express, utter, and declare, by then and there feloniously publishing a certain other printing in one other number of the said public newspaper called "The Nation," which said last mentioned printing is entitled "The Uses of the Union," and contains, among other things, according to the tenor and effect following, that is to say, &c. (setting out a part of the second article and so on) charging the publication of other articles, and setting out portions of them. The 2nd count charged that the said C. G. D., &c., on the 3rd June, &c., feloniously did compass, &c., to deprive and depose the Queen; and the said last-mentioned felonious compassing, &c., did then and there feloniously express, utter, and declare by divers overt acts and deeds hereinafter mentioned, that is to say, in order to perfect, fulfil, and bring to effect his most evil and wicked felony and felonious compassing, &c., he the said C. G. D., on the 3rd day of June, &c., did feloniously publish in a certain other number of a certain other public newspaper called "The Nation," a certain other printing of and concerning a certain other treasonable revolution by him the said C. G. D. then and there feloniously devised and intended to be carried into effect by force of arms, and by traitorously levying war against our said Lady the Queen, and to deprive and depose our said Lady the Queen, &c., and of and concerning the said war intended to be levied as aforesaid, which said last-mentioned printing is entitled "The Business of To-day," and contains among other things according to the tenor and effect following, that is to say (selecting a portion of the article as in the 1st count) and further to fulfil, perfect, and bring into effect his said last-mentioned most evil and wicked felony and felonious compassing, &c., he the said C. G. D., afterwards, &c., and on the 17th day of June, in the year, &c., "did feloniously publish in one other number of the said public newspaper called 'The Nation,' a certain other printing," &c., setting out a portion of the article entitled "The Uses of the Union," and then proceeding as in the 1st count.

The 3rd and 4th counts were similar, respectively, to the 1st and 2nd, but setting out the publications as overt acts. The 5th count charged that the prisoner, on the 3rd of June, in the 11th year of the Queen, feloniously did further compass, &c., to deprive and depose the Queen, and the said last-mentioned compassing, &c., did then and there feloniously express, &c., by divers overt acts and deeds hereinafter mentioned, that is to say, in order to fulfil, &c., his most evil and wicked felony, &c., he, the said C. G. D., on the said 3rd day of June, in the said 11th year of the reign aforesaid, and on divers other days and times after the said 3rd day of June, to wit, &c. (setting out the dates of the publications), feloniously did publish divers other printings in divers numbers of a certain public newspaper, called "The Nation,"

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.

## CENTRAL CRIMINAL COURT.

SEPTEMBER SESSION.

*September 19, 1850.*

(Before the COMMON SERGEANT.

REG. v. COLE.(a)

*Larceny—Allegation of ownership of partnership property.*

*On an indictment for larceny of notes and money from the person, it appeared in evidence that one partner of a firm resided in this country, and the other partner was permanently settled in Belgium. The partner residing here had the sole management of the partnership property, and the banking account was in his name. The notes and money alleged to have been stolen were the joint property of the firm.*

*Held, that the property was rightly alleged to be in the partner resident here.*

THE prisoner was indicted for stealing from the person of Peter Thwaites one canvass bag, two bank notes, each for the payment of 100*l.*, one note for the payment of 5*l.*, and twenty sovereigns, the property of the said Peter Thwaites.

On cross-examination the prosecutor stated that he was a fruit salesman in Covent Garden, that he was in partnership with a person named Isaacs, who resided in Belgium, and that the notes and money which had been stolen from him were partnership property; that shortly before the larceny was committed he had put the notes in his pocket for the purpose of obtaining bank post bills to be sent to his partner in Belgium, that they might be used in the partnership business; that the sovereigns were the produce of a cheque drawn by him upon a bank in which the partnership moneys were deposited, but the account was in his name alone. The money was drawn out for the purpose of being used in the business of the firm, but some portion of it would probably have been employed in his own private disbursements. He considered himself responsible to his partner for the sum which had been stolen from him. The notes and the money were in a canvass bag at the time when they were stolen from him, and the bag was one of several which were used in the joint business.

*Parry* (for the prisoner), upon this evidence, submitted that the indictment laying the property in the prosecutor alone, could not

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

be sustained. The prosecutor had not only stated that the property belonged to the partnership, but all the circumstances he had detailed respecting the ownership, tended to confirm that proposition in point of law.

REG. v. COLE.  
Larceny.

*Robinson* (for the prosecution) contended that the property was rightly laid. The fact of there being a joint ownership was quite consistent with there being such a property in the prosecutor, as would support a count alleging it to be in him. He had the sole management of all the partnership funds, the banking account was in his sole name, and he was invested with a special trust which gave him the character of a bailee with respect to the partnership property.

The COMMON SERGEANT was at first inclined to hold that the property was wrongly laid, but on consulting Mr. Justice Talford, who was in the adjoining court, he held that the allegation of ownership was sufficient, the prosecutor having a special and individual trust of the joint property.

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## COURT OF QUEEN'S BENCH.

July 6, 1850.

### REG. v. THE INHABITANTS OF THE ISLE OF ELY.(a)

*Statute of Bridges—Liability to repair—Shire, riding, or division—Public user—Bridge rendered necessary by an act interfering with a public right.*

*The Isle of Ely is a riding or division of a county within the Statute of Bridges, and its inhabitants are primarily liable to the repair of public bridges within it.*

*The Corporation of the Bedford Level, for the purposes of drainage, had, in 1632, cut a drain across a public highway, and built a bridge to carry the highway over the drain. The drain, its banks, and the bridge, were vested in the corporation :*

*Held, that as the act of cutting a drain rendered a bridge necessary, and that act was done primarily for private purposes, there was a continuing obligation on the corporation to maintain that bridge : and that its public utility did not throw the burden of repair upon the inhabitants generally.*

**T**HESE were two indictments for the non-repair of two bridges; to which the defendants had pleaded specially, setting up the

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.



REG.  
v.  
INHABITANTS  
OF  
ISLE OF ELY.

*Repair of  
bridges.*

Indictment.

liability of the Corporation of the Bedford Level. The 1st count of the indictment as to the old Bedford Bridge was as follows:—

The jurors of our Sovereign Lady the Queen upon their oaths present that a certain common and public bridge situate and being in the parish of Mepal, in the Isle of Ely, and county of Cambridge, over a certain river there called the Old Bedford River, and on a certain Queen's highway there for all the liege subjects of our said Lady the Queen, with horses, carts, and carriages, to go, pass, ride, and travel over at their pleasure, heretofore, to wit, on the 1st day of June, in the year of our Lord 1844, was, and continually from thenceforth hitherto hath been, and still is in great decay, broken down and ruinous, so that the liege subjects of our said Lady the Queen, upon or over the said bridge with their horses, carts and carriages, could not, and cannot pass, ride, and travel without great danger, to the grievous damage and common nuisance of all the said liege subjects of our said Lady the Queen, upon and over the said bridge going, passing, riding, and travelling, and against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity; and that the said bridge is not within any city or town corporate, and that the inhabitants of the Isle of Ely aforesaid, the bridge aforesaid (so as aforesaid being in decay), ought to repair and amend when and so often as it shall be necessary, according to the form of the statute in such case made and provided.

Plea.

Plea to the 1st count:—

William Goddard Jackson and Edward Osborn Dyson, two of the inhabitants of the said Isle of Ely, in the said county of Cambridge, in their proper persons, on behalf of themselves and the rest of the inhabitants of the said Isle of Ely (except the corporation of the Governor, Bailiffs, and Commonalty of the Company of Conservators of the Great Level of the Fens), come and having heard the said indictment read, say as to the 1st count of the said indictment that our said Lady the Queen ought not further to proceed against the said inhabitants of the said Isle of Ely (except as aforesaid), by reason of the premises in the 1st count of the said indictment specified, because they say that the said Old Bedford River in the said 1st count of the said indictment mentioned, was and is situated within the said great level of the fens now commonly called the Bedford Level, and was and is an artificial drain or river, and that the same was long heretofore, to wit, on the 1st of January, A.D. 1632, and at the said parish of Mepal, in the said county of Cambridge, cut and made by certain persons, to wit, one Francis Earl of Bedford and certain other adventurers, for the purpose of draining the great level of the fens, since deceased, whose names are to the said, &c., unknown, then being the owners of divers large quantities of land within the said great level of the fens then requiring to be drained of water, and for the purpose of draining the said great level of the fens and the said large quantities of land, parcel thereof, so vested in them as aforesaid, and

for their own use, benefit, profit, and convenience, and for the furthering of the purposes of the said adventurers, and under and by virtue of certain powers and authorities vested in them, by and under certain commissions of sewers theretofore granted, and certain other powers and authorities in them vested; and that the said Earl and the said adventurers, under the powers and authorities aforesaid, long heretofore, to wit, on the day and year last aforesaid, and in the parish and county aforesaid, constructed and erected the said bridge, in the said 1st count of the said indictment mentioned, upon and over the said drain or river so before then made by them in manner and for the purposes aforesaid, and not upon the ancient course or channel of any stream or river, no bridge being there before or required there until the making of the said drain or river by the said Earl and the said adventurers aforesaid. But the said drain or river having, at the time of the making of the same, intersected and interrupted, and rendered wholly impassable a certain public highway existing at the time of the making of the said drain or river in and along the line of the said bridge, to wit, in the parish and county aforesaid, and on which highway, from time whereof the memory of man ran not to the contrary, until the making of the said drain or river, all the subjects of the kings of this realm had been used and accustomed as of right to pass and repass with their cattle and carriages at all times of the year, at their free will and pleasure, and it having thereupon and thereby become the duty of the said Earl and the said adventurers to construct and erect a bridge over the said drain or river, the said bridge in said 1st count of the said indictment, and hereinbefore mentioned, was by them erected and constructed as aforesaid, in the same place where the said highway, before the making of the said drain or river, was and had been for all the time last aforesaid, and as a convenient, fit, and usual means of passage for the subjects of the kings of this realm, with their cattle and carriages in, over, and along the said portion of the said highway so intersected and interrupted by the said drain or river as aforesaid, and to enable them to pass and repass as aforesaid in, over, and along the said portion of the said highway as they otherwise might, would, or ought of right to have done. And the said W. G. J. and E. O. D. further say, that from and after the alteration of the said highway in manner and to the extent aforesaid continually hitherto, the said highway has been carried, and has gone, and is now carried, and now goes, unto and over the said bridge. (The plea then set out the provisions of the act of Parliament incorporating the adventurers by the title of the Governor, Bailiffs, and Commonalty of the Company of Conservators of the Great Level of the Fens, 15 Car. 2, c. 17.) It then proceeded to allege that before and at the time of passing the said act the said bridge existed and formed part of the works of the Bedford Level, and had been theretofore until the act maintained (there being no agreement to the contrary) by the adventurers; that the said cut or drain had been beneficial and useful to the adventurers from and since the making

REG.  
v.  
INHABITANTS  
OF  
ISLE OF ELY.  
  
*Repair of  
bridges.*

Plea.

REG.  
v.  
CHARLES  
GAVAN DUFFY

1849.

Crown and  
Government  
Security Act—  
Indictment.

far to show that the Legislature meant also to exclude publications from the words "overt acts and deeds." We contend the two last counts are bad; first, for confounding the three crimes created by the Legislature; and secondly, for stating the offence in too uncertain and general a manner. The counts are similar in form, but vary in the intent laid, one being for compassing to depose the Queen, the other for compassing to levy war, and the only overt acts alleged in these counts are publications, though the first part of the counts allege the compassing to have been by "divers overt acts and deeds." If the distinction which we have taken be correct, these counts are bad for confounding the different crimes, as they allege that "such compassings he did express, utter and declare, by divers overt acts and deeds;" but the only overt acts specified are publications. The counts are clearly bad also for generality; the publishing is a part of the *corpus delicti*, and the writings or printings should be set forth: (*Sacheverell's case*, 15 St. Tr. 466.) We admit that in treason you need not set out the whole speeches relied on, but in treason the crime is in the intention; here the writings and printings are part of the *corpus delicti*, and ought to be set out: (*Zenobio v. Artell*, 6 T. R. 162.) It has been expressly decided, that in an indictment for libel, the libel must be set out. In *Lloyd's case* (2 E. P. C. 1122), the same doctrine was held to apply to a threatening letter, in a prosecution under the 15 & 16 Geo. 3, c. 21; also in forgery, the instrument forged must be set forth as being part of the *corpus delicti*: (*R. v. Sparling*, 1 Str. 498; *R. v. Popplewell*, *ib.* 686; *R. v. How*, *ib.* 699; *Rex v. Chear*, 4 B. & C. 902.) All these cases establish this clear principle, that where words or writings form the gist of the offence, or part of the *corpus delicti*, they must be set forth. In 2 Hawk. c. 25, s. 59, the same doctrine is held. In 3 Institutes, 41, there is an indictment under the Statute of Heresy, which Lord Coke held to be bad, as "a general indictment is insufficient in law, albeit the words of the statute are general." Now that indictment is almost *verbatim* the same as the present; it charges "that he composed and wrote divers false and seditious writings, containing matter contrary to the Christian faith." The 7th section of the statute 11 Vict. c. 12, provides that no person tried for felony under this act, if the matter proved shall amount to treason, shall afterward be tried for treason upon the same facts, but no person could avail himself of that provision unless the writings were set forth in these counts. The days certainly are named, but the parties prosecuting are not bound by the days set forth, and a prisoner could not show that he had been before prosecuted for the identical same felonies or treasons; so, if we are right, that in an indictment for compassing any of the objects mentioned in this act, and expressing those compassings by open and advised speaking, it is necessary to actually set out the words. It is a strong authority to show that in case of publishing the publications also should be set

out; and where it is necessary to set out in an information, upon the oath of two credible witnesses, the very words spoken by which the compassings charged were expressed, it is a strong argument to show that in cases of indictments for publications the words also should be set forth, and the 5th section of the statute does not direct the substance of the words spoken to be set out, but "the words." The other four counts of this indictment cannot be supported. Two objections arise to them—first, duplicity; secondly, generality. The objection of duplicity can only be taken advantage of on demurrer, and the rules as to pleadings being double which apply in civil cases hold in criminal cases. In *R. v. Roberts* (Carth. 226), per Holt, C. J., which was an action against a ferryman for taking more than the regular tolls, it was held that every extortion was a separate offence, and they should not all be joined. All the cases are collected in 2 Gabbett's Cr. L. 234. Though *Campbell and Haynes v. The Queen* (1 Cox C. C. 279) is not exactly in point, the doctrine of duplicity, as laid down in that case, was affirmed by Lord Denman on a writ of error. I cite it to show that duplicity is recognised as a defect in that very late case. The question, then, is whether each of these counts charges one offence or more? The 1st count charges that "the said felonious compassing, &c., he, the said Charles Gavan Duffy then and there feloniously did express, utter, and declare, by then and there feloniously publishing in a certain printing in a certain public newspaper called *The Nation*, which said printing is entitled 'The Business of To-day,' and contains, amongst other things," &c. And the said felonious compassing, &c. &c., he, the said Charles Gavan Duffy afterwards, &c. &c., on the 17th day of June, at, &c., did further feloniously express, &c., by then and there feloniously publishing a certain other printing, &c., which said last-mentioned printing is entitled "The Uses of the Union," and so the count goes on to allege eight or nine different publications, each of which, we say, is a separate felony. [RICHARDS, B.—There is one compassing expressed by several publications.] Each of these, we say, constitutes a distinct offence, for the words of the statute are, that if any person whatsoever such compassings, &c. shall declare by "any printing or writing," not "printings or writings," in the plural number. If the jury found a verdict of guilty on one of these printings, it would be an offence, and therefore, necessarily, the indictment contains more than one offence. The moment the prisoner published one of the printings he could have been indicted for it, and if the jury took the same view of the case as the Attorney-General, and found him guilty, he could be punished for it. In treason the case is different, for there the intent or compassing is the offence. It is clear that the prisoner is here charged with several distinct and substantive felonies. The count charges him with compassing to deprive and depose the Queen by the publishing certain articles, and the Attorney-General has no right to throw up to the jury a dozen articles and to say you are to find

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
*Crown and  
Government  
Security Act—  
Indictment.*

out of them all together the intent charged. [PERRIN, J.—What do you say to the 5th section of the statute?] That section enables the prosecutor to charge several felonies in the same indictment, but not in the same count. This being a highly penal act, it is to be most strictly interpreted. There is a somewhat similar provision in the act of 9 Geo. 4, c. 55, s. 41, relating to embezzlement, which enables a prosecutor to charge any number of acts not more than three in the same indictment, using the same words as the statute of 11 Vict. c. 12, s. 5. The manner in which these acts should be charged came in question before Mr. Justice Patteson in *R. v. Purchase* (Car. & Marsh. 617). Upon the similar English statute the practice is laid down in Arch. Prac. 275 (last edition), and the form of indictment given. In *R. v. Purchase* that form was not adopted. Patteson, J., in that case, said, "I think there is no doubt that the prisoner may plead over to the felony if the demurrer be decided against him." That is the opinion of two judges that the prisoner might plead over after demurrer in felony. It was then objected that the indictment was bad for duplicity. The question of duplicity was not decided, the judges being clearly of opinion with the prisoner's counsel on the other grounds. Patteson, J., observing "I am not at all sure that it may have been intended to allow three distinct acts of embezzlement to be charged in one and the same count." Now I admit that that case is not an exact authority for me, but, as far as it goes, it is not an authority for the crown. When I couple that case with the invariable practice and all the forms in the text books, I do not think the Attorney-General will be able to show any case in which three separate acts of embezzlement have been charged in the same count of an indictment. If the separate offences were charged in separate counts, the court could put the prosecutor to his election, but if they are charged in the same count, the prosecutor cannot be put to his election; besides, by adopting the practice of the Attorney-General in this case, the grand jury may find the bill against the prisoner on one article, and the petty jury may find him guilty on a different article, and thereby the prisoner may be deprived of his common law right, to have the offence found by the grand jury and also by the petty jury. It may be said that the indictment should be very long, but, as was observed in the case of *O'Connell v. The Queen*, by Lord Denman, the Attorney-General need not put so many offences in an indictment. The first four counts are equally liable to the objection of uncertainty as the last, for they charge that C. G. D., the said compassings, &c., did express, &c., by then and there feloniously publishing a certain printing in a certain public newspaper called *The Nation*, which said printing is entitled "*The Business of To-day*," and contains, amongst other things, according to the tenor and effect following, that is to say, &c., not averring that in that particular portion so set forth, he did utter, express, and declare, the particular treasonable compassings which constitute the offence. It is quite consistent with the indictment

at he did not in the part here set forth, express the treasonable compassings charged, and if the jury thought that by any portion of the article not set forth he had so compassed, they might find him guilty. I do not contend that the prosecutor is bound to set forth the whole of a long publication, but there is no averment connecting the compassing charged with the parts set forth. By making such an averment as the present, the crown is entitled to give the whole article in evidence to the jury and to tell them that they are bound, if they find the compassing in any part of the article, to find the prisoner guilty. But, if your lordships hold with us that it is necessary to set forth the whole portion of this article, which contains the treasonable compassings, this indictment is bad. There is no colloquium here. It is utterly impossible to understand those articles without something to explain them; there is no averment of extrinsic facts. In one of the articles "The French Revolution" is mentioned, but your lordships know nothing judicially of "The French Revolution." There have been revolutions in France in 1781, 1830, and the last revolution of 1848. It is also stated that "The Repeal Association" is to be dissolved, and "Loyola" is mentioned. The court cannot, in this indictment, understand who Loyola was, or what the Repeal was. There should have been proper innuendoes,—there should be a colloquium. The indictment should aver that these articles were published of and concerning some treasonable design then on foot or intended; but there is no prefatory averment at all here. The message is set forth nakedly in the indictment. It should have averred it to have been of and concerning the Queen, or of or concerning some project then on foot. It has been laid down by Hale (1 P. C. 118), and by Foster (Disc. on Tr. Ch. 56), that three things are necessary to constitute an overt act; first, that it should be public; second, that it should clearly show some treasonable design; third, that it should be of and concerning some design then in existence. Foster lays down that the writings must be relative to some plan or design charged in the indictment; mere writings referring to vague designs never to be put in force were not intended to be treason; no printings or writings are now made openly which were not overt acts of treason before the passing of the Statute of Victoria, but to constitute a felony they must be such as would previously have constituted overt acts of treason. The instruction which has been invariably put on the statutes 36 and 57 Geo. 3, warrants me in this position: (*Watson's case*, 32 St. Tr. 79; *Thistlewood's case*, 33 St. Tr. 684.) The publications, to comply with the essential requisites of the law, should express, aver and declare the compassings, and should be published of and concerning some design then in progress. The second count does not allege a design; it states that he, the prisoner, did feloniously publish, &c., a certain other printing of and concerning "a certain other treasonable revolution," but it does not allege that there was any revolution then intended; to hold otherwise, would be to introduce other facts into the colloquium which would be contrary

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
*Crown and  
Government  
Security Act—  
Indictment.*

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.

to all principles of law and evidence; it is within the cognizance of the court that the Queen has soldiers and a navy, but not that a revolution was intended. To the 2nd and 4th counts the objection to the 5th and 6th is also applicable, namely, of confounding the offences charged, and to all the counts the objection of generality is applicable.

*Baldwin, Q. C., contra*.—I submit, on behalf of the Crown, that this indictment is sufficient, and not open to any of the many objections which have been urged. It contains a clear offence within the statute of 11 Vict. c. 12, the gist of the offence is the compassing, but it is necessary that the compassing shall be evidenced in a particular way, but that way, so made evidence by the statute, is not part of the *corpus delicti*. The indictment is framed as expressive of two intents to deprive and depose the Queen from the style, honour, and royal name of the imperial crown of the United Kingdom, and to levy war against Her Majesty. It is insisted that the 5th and 6th counts are bad for two reasons; because the articles are not set forth, and because they are too general. But there is nothing I contend in this act to exclude the publishing of printings from being overt acts, as under the old law of treasons. The language of the present act is taken in express terms from the 36 Geo. 3, and from the precedents it is clear that no such objection was ever taken under the former statute, proceedings under which would be equally open to these objections as under the act of 11 Vict. The form of this indictment has been taken from well established precedents used from the passing of that act to the present time. [PERRIN, J.—Is there any reported case in which such counts as these are found?] There are; in *Thistlewood's case* (33 St. Tr. 701) the indictment is similar (*ib.* 705, 707.) As to the objection that the counts are too general, there is no analogy between the cases cited and this. *Zenobio v. Axtell* (6 T. R. 162), was the case of a libel written in the French language; the plaintiffs stated what was described as a translation without stating what the original was, or giving the court the power of judging whether it was a correct translation or not. In *Lloyd's case* (2 East P. C. 1122), which was a proceeding under the Black Act for sending a menacing letter, no portion of it was set out. In all these cases there was the obvious distinction that the thing omitted was not evidence of the *corpus delicti*, but the *corpus delicti* itself; there are not three classes of offences created by this statute. The offences are the compassing and imagining to dethrone the Queen or to levy war against her, but by different means. *Sacheverell's case* (15 St. Tr. 1) is relied on as one of the strongest authorities in favour of the objection, but in the same volume of the State Trials, as reported in p. 938, the objection made by prisoner's counsel, that is as much as is required by the act of Parliament. [PERRIN, J.—What is the date of that case?] 1717. *Layser's case* occurred in 1722. In the 5th and 6th counts of this indictment the acts are laid generally. The objections taken to these counts

is twofold; first, that the publications have not been stated; secondly, that the counts are too general. It is admitted that they would have been good counts in treason, but it is alleged that in treason-felony they are bad, because, while in treason the compassing is the offence and the overt acts are mere evidence of it, under the statute 11 Vict. c. 12, two things are necessary to constitute the crime, the compassing and the manifestation of it, and that the acts (the publications), being a part of the *corpus delicti*, should be set forth in the indictment. But if, as I contend, there is no distinction in this respect between treason and treason-felony, it disposes of the objection to these two general counts. Under the old laws and the old Act of Treason of Edward the Third, compassing to depose the sovereign, or compassing to levy war, were not substantive treasons, but might have been used as overt acts of other treasons until the act of 36 Geo. 3. Lord Mansfield, in *Thistlewood's case* (33 St. Tr. 68), adverting to the statute Edw. 3, says, in his charge to the grand jury, that the crime of treason consists "in the compassing, imagination, or intention to perpetrate the acts, and not in the actual perpetration of them," and that under the statute 36 Geo. 3, the law requires that the party shall express, utter, or declare his intention, by publishing some printing or writing, or by some overt act or deed. The law has thus wisely provided that in cases of this kind, which manifestly tend to the most extensive public evil, the intention shall constitute the crime, but the law has at the same time, with equal wisdom provided, that the intention shall be manifested by some act tending towards the accomplishment of the criminal object. It is contended by my learned friends at the other side, that only that there is the distinction that the overt act is made under the Statute of Victoria part of the *corpus delicti*, but also that where there is made by the statute of 36 Geo. 3 but one crime—the compassing,—there are, by the Treason Felony Act, three crimes. I do not deny that for the purpose of prosecuting a case successfully must be shown that the two things exist, the compassing and the publication, but I deny that the publication is a portion of the *corpus* of the crime, and submit that it is only a portion of the evidence of it, as it was under the stat. 36 Geo. 3. Looking at the language of the act of the 11 Vict., without going out of the statute itself, it is plain that it contemplates that the compassing shall be the offence and nothing else. The 3rd section provides that if any person whatsoever shall compass to deprive or depose the sovereign, to levy war against the sovereign, &c., and such compassings shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony. Will the court hold that the larger and more general words which follow the enumeration in the first part of the clause are to have a limited construction put on them by reason of the immediate antecedent? Those words should be construed to mean things *ejusdem generis* with those previously enumerated, and then the section would read—by open or advised speaking, or by any other overt act or

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.



REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.

deed *whatsoever*,—as if the latter word were incorporated in the sentence; and the next section (the 4th) shows plainly that there is a distinction taken in the act between the offence and the evidence of it, but that the offence remains the same, namely, the compassing. The 5th section enacts, that it shall be lawful in any indictment for any *felony* under this act to charge against the offender any number of the malicious acts or deeds by which such compassings, &c., or any of them, shall have been expressed. What is the *felony* which is there mentioned in the singular number? If it be not the compassing, it should be in the plural; if not, we should have as many felonies as there are overt acts in the indictment, for the words are “in any indictment for any felony,” and a separate count in the eye of the law is considered a separate indictment. If the question were new, I would submit that the offence was complete by the compassing alone, and that as the compassing must be evidenced by some acts, that the Legislature has provided, in several sections, for the manner in which the compassings should be evidenced. [PERRIN, J.—You say that the compassing alone is the offence; now suppose that the indictment charged the compassing alone, and that the prisoner came here and either pleaded or confessed, suppose he came and said he could not deny but he had compassed to depose the Queen, would the court be warranted in pronouncing judgment upon him?] There is but one crime, but the evidence of it should be stated. [PERRIN, J.—Is there any other instance in which the proof of the offence needs to be stated?] In other cases the offences are plainly to be seen; in the present case the offence is a peculiar one, being mental. The words of the 36 Geo. 3, and of the 11 Vict. being the same, the interpretation which has been put on the words in the former statute must be put on the same words in the 11 Vict., until all the authorities on the subject are disturbed; and it is conceded that these counts would be good in treason. Now, if these acts are to be held to be of the *corpus delicti*, see the difficulty on which my learned friend stands. He admits that the statute 36 Geo. 3, creates but one offence, but he makes the same language in the 11 Vict. to constitute three offences, though he says it only creates one offence in the former act. It is in effect this: suppose the 11 Vict. merely recited the 36 Geo. 3, and an intention of transferring it to Ireland. It then would be an offence of treason here, and could it then be contended that the counts would not be good here which would be good under the 36 Geo. 3, in England; that, if the argument at the other side is good for anything, would be the effect if there was merely a transfer of the act to this country, by reference, without any enacting part. In a proceeding tried on the 1st April, 1848, in England, it would clearly not be requisite to set out the overt acts. Can it then be contended that if the offence was tried in England on the 22nd of April, after the act of 11 Vict. had come into operation, the Attorney-General would be bound to set out the overt acts, the language of both statutes being the same?

(*Watson's case*, 32 St. Tr. 87-89.) [PERRIN, J.—That indictment was not under the 36 Geo. 3.] From the charge of the Lord Chief Baron, in the case of *Reg. v. Martin*, (b) it is plain that he considered the law remained unchanged by the 11 Vict., and that the offence remained the compassing, but that the overt acts were only evidence of it. As to the objection of generality, the same objection was taken in *Martin's case* (3 Cox Crim. Cas. p. 318.) [PERRIN, J.—But the court gave no judgment on those counts.] If my learned friend has not carried the court with him in this position, that there is a distinction between treason and felony, of what use are all the cases which have been cited? In *Zenobio v. Axtell*, the declaration did not state one word of what the defendant was alleged to have written, but a translation merely, if there is no distinction to be taken between treason and treason felony, it disposes of all the cases under the Black Act, which have been cited, and *Sacheverell's case* and *Layer's case*, and all that class of cases, are out of the question, unless it can be established that the publication is a part of the *corpus delicti*; and as to the objection, that if the offence be not specified the prisoner could not plead *autrefois* acquit or convict, the same objection would lie in treason. But the section of the 11 Vict., which provides, that if the offence amounts to treason the indictment shall not be therefore bad, proves incontrovertibly that there was intended to be no distinction, and that there is no distinction such as has been contended for, between treason and felony. There is but a single crime alleged throughout the indictment, therefore there can be no duplicity; the crime is the compassing, which is alleged to have been evidenced in various ways. As to the not setting out the whole articles, it is, if any thing, better for the prisoner, for if the passages we have set out are not evidence of the intents which we impute, we must fail before the jury, and the indictment must be bad on general demurrer. (The learned counsel read several portions of the paragraphs set out in the indictment.) These passages are plainly, as we submit, evidence of the design charged. We have also an authority in the case of *Martin v. The Queen* (3 Cox Crim. Cas. 318), the indictment, in which contained the same, except that there all the articles were set out in full upon the writ in error in that case. The 2nd objection was, that the writings charged as overt acts were not set forth. The Lord Chief Justice says (see 3 Cox Crim. Cas. 353), "it is not necessary to decide on this objection, and I pass it by, merely observing that the counts here are conformable to the precedents for high treason under the English act of the 36 Geo. 3, of which the act of the 11 Vict., on which the present indictment is founded, is a literal transcription." I submit therefore, in this case, that my learned friends have failed to show that there is the distinction that they contend for between treason and felony, and that the case, standing just as it

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
Crown and  
Government  
Security Act—  
Indictment.

(b) The Report by Mr. George Hodges, shorthand writer, made for the use of the Government, is here referred to.

REG.  
v.  
CHARLES  
GAVAN DUFFY.

1849.

Crown and  
Government  
Security Act—  
Indictment.

did before the passing of the 11 Vict., we are entitled to call on your lordships to give judgment in favour of the crown.

*Butt*, Q.C., for the prisoner.—The 1st and 3rd counts must stand or fall together. They are bad on three grounds—first, they do not set out the writings by which the compassings are said to be expressed with sufficient certainty; secondly, each of them charges distinct felonies in a manner not allowed by law; thirdly, the printings or writings are not introduced with the inducements and averments necessary to fix upon them the felonious meaning imputed to them by the indictment. The indictment certainly is not warranted by precedent. It ought to have stated the writings entire to enable the court to judge whether they were such as to justify a prosecution under the act. It is only necessary to read the terms of the Act of 11 & 12 Victoria to satisfy any mind that the expressing, uttering, and declaring, are an essential ingredient of the crime, and that an indictment which did not in that respect follow the words of the act would be bad. The “expressing” is as much a term of art in this indictment as the word “murder” in an indictment for that offence. The averment is of a fact which ought to be submitted to the jury, and one which cannot be supplied by intendment. This being a new felony created by this statute, it is only confusing to refer to the form of indictments in cases of treason. There are many distinctions between the offences. A man might be indicted under this act when he could not be indicted for treason after the limitation of three years, prescribed by the 1 & 2 Geo. 4, c. 24 (Ir.), had expired: (*Martin’s case*, per Pigot, C. B. Hodges’ Rep. pp. 439, 440, 172.) There are privileges given in treason cases which do not exist in prosecutions under this act. In 2 Hale P. C. 169, it is laid down that an indictment is nothing else but a plain and certain narrative of an offence committed by any person, and of those necessary facts that concur to ascertain the fact and its nature: (2 Gabbett’s Cr. L. 198.) Citing *Rex v. Horne*, per De Grey, C. J. (Cowp. 682), who observes “the charge must contain such a description of the crime that the defendant may know what crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of ‘guilty’ or ‘not guilty’ upon the premises delivered to them, and that the court may see such a definite crime that they may apply such a punishment as the law prescribes.” These observations, strong in any case, become more so in cases where the punishment may vary from a month’s imprisonment to transportation for life. Suppose the Attorney-General in this case asks the court, as he has said he will, for final judgment on this demurrer if it be against the prisoner, the court has not before it the publications on which the grand jury found the bill. In 2 Hawk. P. C. c. 25, s. 59, it is said to be “a good rule in indictments as well as appeals that the special manner of the whole fact ought to be set forth with such certainty that it may judicially appear to the court that the indictors have not gone on insufficient premises.” It might be that the very parts set out were not the parts on which the

ary found the bill, and Hawkins, in vol. 2, P. C. lib. 2, 57, also says, regularly every indictment must charge a particular offence, or else with several of such particularly and certainly expressed, and not with being in general, for no one can well know what defence to a charge so uncertain, or to plead either in bar or abate a subsequent prosecution; neither can it appear that the ten in evidence against a defendant on such a general accusation are the same of which the indictors have accused him; can it judicially appear to the court what punishment is for an offence so loosely expressed. If the compassing be the crime, if the prisoner be found guilty upon one article passing to depose the Queen on the 2nd June, could he, if indicted and subsequently indicted on another article for a compassing to depose the Queen on the very same day, plead *autrefois* I apprehend he could not. *Sacheverell's case* (15 St. Tr. 1,) *Fisher's case*—cases of libel—suggest the most natural analogy. In indictments or in civil actions for libel, it is not sufficient unless the very words are set out: (*Wright v. Clements*, Ald. 503; *Gutsole v. Mathews*, 1 M. & W. 495; *Woods v. Taunt.* 169, 1 Marsh. 522; S. C., *Zenobio v. Artell*, 162.) But the rule is by no means confined to libel cases. The court will find that wherever any written instrument is of the nature of the crime it must be set out, that the court may see that it authorizes them in pronouncing judgment. In *R. v. Wood others* (6 East, 417), Lord Ellenborough doubts the case of *Fuller* (1 Bos. & Pul. 180), and observes, in giving judgment, "I do not know any case, where an offence consists in words only, where the same general and compendious method of charging it has been deemed sufficient without stating the words necessary to constitute the offence," and on a future day, after having referred to *Rex v. Moors and others*, held the indictment was bad. [PERRIN, J.—There is a very strong case for you—*R. v. Williams*—which was a proceeding against the defendant for "Paine's Age of Reason." I go thus far with your argument, that if the part set out does not express the intention charged, the indictment fails.] In *Clements v. Fisher* (7 B. & C. 459), the declaration was held bad for not averring that the matter published was libelous concerning the plaintiff. There are certainly exceptions to the rule, but nothing can supply the omission in this indictment to aver that he did express, utter, and declare the compassing and concerning Her Majesty or the Government. Suppose the court find the indictment as it stands, is there a particle in it that the intentions charged are to be found in the passages? *Wright v. Clements* goes a long way to establish the validity of this objection. In forgery, before the statute 2 & 3 Geo. 4, c. 123, s. 3, it was necessary to set out the indictments, the same rule existed in prosecutions for administering unlawful oaths before the 27 Geo. 3, c. 15, and in perjury and prosecutions for receiving goods by false pretences before the statute 31 Geo. 3, s. 1: (*R. v. Murray*, 2 Str. 1127; *R. v. Perrot*, 2 M. & S.

REG.  
v.  
CHARLES  
JAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
Crown and  
Government  
Security Act—  
Indictment.

379; *Young v. The King*, 3 T. R. 102; *R. v. Gill*, 2 B. & Ad. 204.) At common law, and anterior to the statute of Edw. 3, there was no necessity to set out any overt acts at all. The offence was in the compassing, and the overt acts were considered as the means used to effectuate the intention: (*Foster's Cr. L.* 193.) In *Kelyng*, p. 8, it is laid down that the statute is perfectly satisfied by alleging one overt act, and the prosecutor may then prove as many others as he thinks fit. The old statutes of treason do not afford an analogy. There is a clear distinction between overt acts, which are merely evidence of the guilty intention, and where they are themselves of the essence of the crime charged. The passages omitted from this indictment may have been those on which the grand jury have found the bill. If this objection be good, it goes to seven out of the nine publications referred to in the indictment: (4 *Wentw. Pl.* 199). It will, no doubt, be argued by the Attorney-General that there are two entire publications charged, and that these are sufficient to sustain this indictment (*Fost. Cr. L.* 194), and the analogy of treason cases will be relied on: (*Lowick's case*, 13 *St. Tr.* 267.) In *Laver's case* (16 *St. Tr.* 93,) it is said that if the overt act be badly laid, it should be taken as if it was out of the indictment, and no evidence given upon it; and in *Rez v. Rhodes* (2 *Ld. Raym.* 886,) it was held that in a prosecution for perjury, if one perjury be well assigned it will sustain the conviction; but in *O'Connell and others v. The Queen*, (11 *Cl. & Fin.* 379, and 1 *Cox Crim. Cas.* 413), the authority of that case appears to have been much shaken. In *Reg. v. Parker* (1 *Car. & M.* 644), the course of taking a partial demurrer was suggested by Tindal, C. J. I shall submit, if the court be of opinion that the two publications which are set out are sufficient to sustain the indictment, that then your lordship will treat this as a divisible demurrer, and give judgment for the prisoner on those portions of it which are tenable, which was the old practice in civil cases; and I would call on the court either to rule the entire case with us or treat it as a divisible demurrer. But I submit that it is impossible to separate these allegations, for the grand jury have presented that he did "further express," &c., and therefore must have had in their mind the previous "expressions." The letters are set out without any previous averment of a treasonable intent. There are no circumstances or inuendoes made use of to show the guilty intent. Does the statute of 1796 enable the Crown to charge any publication in a way in which they could not charge it under the statute of Edw. 1 as an overt act? If it does not, it is necessary for them to set them out as overt acts. If it does, the overt acts are different things: (*Sidney's case*, 9 *St. Tr.* 817.) [PERRIN, J.—*Sidney's case* was not for published writings.] Even published writings must refer to some design then on foot. If the writings are to be considered as mere publications, and not as overt acts, and are capable of two meanings, one guilty, the other innocent, the prosecutor ought to refer to that which he alleges to be the guilty meaning (*Black v. Holmes*, *Fox & Sm.* 28), and for want of this the indictment is uncertain. One count charges an

intention to depose the Queen, another to levy war to compel her to change her measures and counsels. It is clear, therefore, that the publications are alleged to contain two guilty meanings at the same time, and, I may contend, one innocent meaning. There should have been a prefatory averment to show the guilty meaning. There is but one inuendo in the indictment from beginning to end, namely, "My dear Sir," meaning William Smith O'Brien. The mere levying war is not an offence under this statute which limits the offence to levying war to compel Her Majesty by force and constraint to change her measures and counsels. If there was an insurrection of people at Clonmel, it would be treason, but compassing to raise it would not. At the recent trials at Clonmel, the court, with the concurrence of the Attorney-General, directed an acquittal on every count charging an attempt on the life of the Queen: (*Lord George Gordon's case*, 21 St. Tr. 485.) The cases of Essex and Southampton seem to have been misunderstood in the text books. Lord Bacon gives the best account of the case in which he was prosecutor: (Bacon's Works by Montague, vol. 6.) There ought to be an inuendo if the publication be capable of a guilty and an innocent construction, and if it be capable of two guilty constructions, there ought to be two inuendoes: (1 Man. & Gr. 732, in note; *Markman v. Sheperdson*, 11 Adol. & El. 411; *Pinkney v. Inhabitants of Rutland*, 2 Saund. 379; Com. Dig. tit. "Pleader, C." 32; *Briscoe v. Hill*, per Parke, B. 10 M. & W. 735; *Reg. v. Burrison*, 4 Jur. 698.) If the court think that any part of this indictment is good, they ought to give judgment that we answer so much of it as is good; but, if the court hold that it is so, does it not show that it is open to the objection of duplicity: (*Reg. v. Burrison*, 4 Jur. 698); *O'Coigley & O'Connor's cases*, 26 St. Tr. 1191, decided in 1799; *Despard's case*, 28 St. Tr. 345, in 1802; *Watson's case*, 32 St. Tr. 681, in 1817, and *Brandreth's case*, 32 St. Tr. 755, in the same year, and *Thistlewood's case*, 33 St. Tr. 681, in 1820 all infer but the one declaration, the one compassing. *Watson's case* is not authority against us nor for these general counts, for the evidence was given on the third count, which was for levying war. As to the law regarding a partial demurrer (1 Chitty Cr. L. 442-3), the moment you decide that the demurrer is good to part and that the prisoner must answer the remainder, the objection of duplicity arises, and if the charges are all combined, a portion being bad, the whole is bad on the authority of *Reg. v. Burrison* (4 Jur. 698.) The compassing is charged to have been on the 3rd June, and then it is alleged to have been further expressed by publications on the 29th July, but under this act, the compassing and expression must be contemporaneous, and the only way to get rid of that vice in the indictment laying it all as one transaction is, by importing into it a continuendo. The Act of Victoria allows of several felonies being charged in an indictment under its provisions but confines the party to one compassing: *Thistlewood's case* (33 St. Tr. 681.) There must be either two distinct compassings, and then it is duplicity, or else it must be a charge that on the 29th July he expressed what he had compassed on the 3rd June,

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.

REG.  
v.  
CHARLES  
GAVAN DUFFY.

1849.

Crown and  
Government  
Security Act—  
Indictment.

which is a past compassing, the expression of which is no offence. But the 2nd count is clearly bad, the compassing is laid on the 3rd June. The count states that he, on the 3rd of June, feloniously did compass, &c. and the said felonious compassing then and there feloniously did express, utter and declare, by publishing a certain printing, &c., and the said felonious compassing, &c., he the said C. G. D., afterwards, &c., on the 17th day of June, did further feloniously express, utter, and declare, by then and there feloniously publishing a certain other printing, which is plainly bad for repugnance. In 2 Hawkins, P. C. 25, s. 27, it is said that if an indictment lays an offence on an impossible day it is void. Here some acts in the indictment are alleged to have been done on the 3rd July, some on 29th; taken as a whole, the indictment is insensible and repugnant. *Dennison v. Richardson* (14 East, 296) shows how strongly, even in civil cases courts will lean against repugnancy: (Hawk. P. C. c. 23, s. 90.) The objection of repugnancy applies to the 2nd, 4th, 5th, and 6th counts, (*Rex v. Locock*, 3 Burr. 1901.) To aver in an indictment an offence in the time of one sovereign against the peace of another is clearly bad. The 5th and 6th counts are also bad for misdescribing the offence: they should have laid the publications as such, not as overt acts, for there may be publications which are not overt acts; there are offences under this statute which are not included under "overt acts." This appears from that part of it which refers to open and advised speaking. In Archb. Cr. Pl. 199, the cases are collected contrary to some other decisions; it was held (*R. v. Douglas*, 1 Campb. 212) that a man might be convicted of stealing a ewe upon an indictment for stealing a sheep, sheep being the generic term, I apprehend that it is the general rule, and the only way the objection can be got out of is by holding the last word to be a generic term: (*Rex v. Howell*, 6 Car. & P. 148; S. C. 1 Moody C. C. 405; 1 Archb. Cr. Pl. 99; edit. of 1846.) The pleader here as to the general counts has brought them as far as can be within the authority of *Clements v. Fisher*. Sir John Hawles remarks in *Dr. Kelly's case* (1 Burr.), "I question whether even in treason this colloquium is sufficient to sustain the indictment in the allegation." The grand jury have found all these acts to make one declaration, therefore if your lordships think any one of them bad, the bill cannot be sustained; in every one of the cases cited at the other side, there was an allegation of a conspiracy, as in *Thistlewood's case* and *Watson's case*.

December 29, 1848.

The *Attorney-General* (*Monahan*), in reply.—The objections which have been taken to the 1st and 3rd counts are threefold: that they are not sufficiently certain; that they do not contain extrinsic averments or inuendos; and lastly, on the ground of duplicity—namely, that they contain publications which were made at different times and different places, and therefore that the counts are liable to the charge of duplicity; and a number of cases have been cited at the other side to sustain this objection, which

are not in point. I admit that in cases of actions or indictments for libel, or for oral slander, or for sending a threatening letter, it is necessary to set forth the very words on which the prosecutor relies, either as an injury to his character, or as constituting a breach of the law: the counts in this case follow the indictment in *Martin's case*, except that the latter contained several matters which I think it need not. The objections raised upon the two last counts I need not discuss at present. [RICHARDS, B.—Then you say that in principle the indictment in this case is the same as the indictment in *Martin's case*, as to the non-introduction of inuendos or specific averments.] I do: in *Martin's case* the indictment said, which publication “is to the effect following;” in this case it is said “which is, amongst other things, to the tenor and effect following.” The pleading in this case is a literal transcript of approved precedents in cases of libel: (*Lord George Gordon's case*, 22 St. Tr. 177; *Paine's case*, 22 St. Tr. 360; *Holt's case*, *ib.* 1200; *William's case*, 26 St. Tr. 646.) In *Tabart v. Tipper* (1 Camp. 350), Lord Ellenborough says, “The more correct way would have been to have said, in a certain part of which said libel there was and is contained,” &c. It appeared that between the different parts of the libel, there was, in the original, a Latin line, which the pleader omitted, but inasmuch as it did not alter or vary the sense, Lord Ellenborough refused to nonsuit the plaintiff. The only question, then, which I submit can arise on this point is, whether the writings which are set out do appear, on a perusal of them, to contain in them such compassings as we have charged. [RICHARDS, B.—You say that the court is to look into them.] I do: it did so in *Martin's case*. I think no one who reads the articles can doubt that they bear the meaning which we put on them: (*Irvyn's case*, Kel. 22.) Most of the cases referred to at the other side are cases which might not have referred to the prosecutor at all: inuendos are only used where the meaning is doubtful or ambiguous; but here, I think your lordships will be of opinion that the only meaning which these publications could bear is, a compassing to deprive and depose the Queen from the style, honour, and royal name of the imperial crown of the United Kingdom; if there is any count unobjectionable, the demurrer must be overruled: (*Reg. v. Rhodes*, 1 Ld. Raym. 886; *Reg. v. O'Connell*, per Lord Denman, 11 Cl. & Fin. 379, 380; and 1 Cox Crim. Cas. 413.) The next objection raised is duplicity, that there are several different offences alleged. But upon the statute Edw. 3, I think that, even independently of the 5th section of the act of Victoria, what has been done here might have been well done; but that section removes all doubt; the practice upon the statute of Edw. 3, from the earliest times, was, that the prosecutor was at liberty to prove as many overt acts as he pleased of the compassing alleged. Take the analogous case of perjury: there, though the offence is the falsehood,—the taking the false oath,—it was never contended that the averring in the indictment the several parts of the falsehood, was duplicity; but in order to prevent the question being raised in cases like the

REG.  
v.  
CHARLES  
GAVAN DUFFY.

1849.

Crown and  
Government  
Security Act—  
Indictment.



REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
Crown and  
Government  
Security Act—  
Indictment.

present, the Legislature have, in the 5th section of the statute, under which this indictment has been prepared, enacted, "that it shall be lawful, in any prosecution for felony under this act, to charge against the offender any number of the matters, acts, or deeds by which such compassings, imaginations, inventions, devices or intentions as aforesaid, or any of them, shall be uttered or declared." Let us go back, my lords, to the portion of the statute which enumerates the matters by which the things are to be expressed, uttered or declared; they are, according to the 3rd section, to be expressed, uttered or declared, "by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed." I think your lordships, on consideration, will be of opinion that the Legislature, having assimilated the recent act to the law of treason, have required an overt act to be stated that this provision was introduced to render the pleading under this statute the same as the pleading under the statute of Edw. 1. It is conceded that the prosecutor is in some way or other to be at liberty to avail himself of the 5th section; and I submit that the only way the overt acts which are capable of proof could be put forward, is as they have been. A dictum of Mr. Justice Patteson has been cited, that in embezzlement, if there are separate acts of embezzlement, the proper course is to put them in separate counts; in cases of embezzlement the offence is single—the taking of the property—therefore the facts need not be set out. But here it has been provided, that you may charge any number of acts or deeds by which the compassing shall have been expressed; in *Campbell & Haynes v. The Queen*, the opinion of Lord Denman is, that duplicity may be taken advantage of in arrest of judgment, as well as on demurrer. So, in *Martin's case*, which I do not refer to as an exact authority, as the point was not argued. The language of the 36 Geo. 3, favours my argument, it is precisely in the same words as the Statute of Victoria, save that the latter introduces open and advised speaking, but as regards printing and publishing it is just the same. The precedents of indictments in *Watson's case* and *Thistlewood's case*, under the statute of Edw. 3, and 36 Geo. 3, are precisely as here; in *Watson's case* there was an acquittal, but in *Thistlewood's case* there was a conviction on the count under 36 Geo. 3, in which several overt acts were laid; on these grounds, therefore, I submit that as to the 1st and 3rd counts, there is no ground for the demurrer: (*Fitzharris's case* (8 St. Tr. 337, 338.)) Now, as to the 2nd and 4th counts, the objection is, that according to the true construction of this statute, a publication cannot be relied on as an overt act, because the Act of Victoria takes a distinction between publications and overt acts. An overt act, I think, means any thing done in furtherance of the object. Now, in all the older precedents, the court will find the offence laid thus: that he did compass, imagine, &c. to subvert the Government, and to put the King to death, and in order to perfect and fulfil and bring to effect, &c., he did, &c.; but the acts are alleged to be done in furtherance of the precise compassing alleged in the early part

of the counts, and it is perfectly well settled before the 36 Geo. 3, that the publication of documents of a certain character are overt acts (*Cole's case*, 7 St. Tr. 3-6; *Fitzharris's case*, 8 St. Tr. 337-338); and under the 36 Geo. 3, publications have been so considered, as in *Thistlewood's case*, where the publication of placards was so held; and publications, if they are intended to be used in furtherance of the object, can be relied on as overt acts; but it is contended that because the statute says, if any person shall express, &c., by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed, a printing cannot be used as an overt act, and some cases have been referred to to sustain this proposition. A case was cited in which the court held that stealing a ewe was not stealing a sheep. [PERRIN, J.—Not that it was not stealing a sheep, but that it was not an offence under the statute, which takes a distinction between sheep and ewes:] (*Reg. v. Spicer*, Car. & Kirw. 699.) I submit that the objection cannot apply where the documents, as we allege, were published in a public newspaper, and themselves show the intent. It is impossible not to hold them to be overt acts. The letter to Mr. W. S. O'Brien, and several other passages charged in this count are clearly overt acts, expressive of an intention clearly averred. But supposing there is the distinction between publications and overt acts, the allegation that they are overt acts is surplusage; but after *Thistlewood's case* it would be idle to say that they are not overt acts, and further, some of the documents were not published, but were written for the purpose of being published in a certain public newspaper. But then it is said that there is a repugnance in the manner in which these overt acts are stated. Everything which I have stated on this point as to the 1st and 3rd counts applies to the 2nd and 4th; and as to the allegation that we do not set forth the whole of the publications, the court will find that in the precedents of indictments for treason both under the 25 Edw. 3 and 36 Geo. 3, the publications are not set out, they are only just stated as in the 5th and 6th counts here, and therefore, if the objection is not applicable to the 5th and 6th counts, *à fortiori* it is inapplicable to the 1st and 3rd or 2nd and 4th; and in *Francia's case* (15 St. Tr. 898), the reason is given. *Sacheverell's case* was relied on, and it was urged that a certain letter ought to have been set forth, but it was held that the writing and publishing was the overt act, and the contents of the letter merely evidence. This case is also on other grounds distinguishable from cases of libel and slander, which stand on particular grounds. The allegation in such cases is, that the defendant did publish the matter of and concerning a particular person. The gist of the offence is the publishing the particular document, and it has been held that the document must be set forth to enable the judges to decide whether the publishing is an offence, as in the statute regarding the sending threatening letters, the sending the letters is the offence, and the letter must be set forth to enable the judges to decide whether it be an offence or not, and in forgery the document must be set out to enable the court to decide whether the document said to be forged comes within the

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.

description in an act of Parliament. The language of the 25 Edw. 3 is, "if a man shall be proveably attainted by open deed." Now it is not contended that the publication of these documents is not an open deed, but it was never understood to be necessary to set out the document: (*R. v. Meeham*, 6 East, 425.) I do not see what the distinction is between treason and felony. The treason is the offence. The penalty in the present case is lower, but that is the only difference. The language of both acts is the same. The statute does not say by publishing seditious printing, for then it might be necessary to set it out to see whether it was seditious or not, but by publishing *any* printing. It has been urged that the 2nd count is repugnant in time and place. The objection is applied to the 2nd and 4th and 5th and 6th counts. There is but one compassing evidenced by several overt acts, and the time is not material. As to the point of duplicity, the 5th section is that "it shall be lawful in any indictment for any *felony* under this act to charge against the offender any number of matters, acts, or deeds." If what is contended for by the other side is correct, the word would be *felony*. With respect to the allegation of repugnancy, the objection is, as I understand it, that we allege the compassing on the 3rd June, and that the said felonious compassing he did then and there express, &c., that is to say, in order to fulfil his most evil and wicked felony, &c., he on the 3rd day of June, &c., and on divers other days and times after the said 3rd day of June, to wit, on the 17th day of the same month of June, &c. &c., but the demurrer does not apply to that portion of the count which sets forth the documents constituting the overt acts of the 3rd June, and being to the whole count is too large (*Reg. v. Rhodes*); but even if well founded it does not apply to the 2nd count of the indictment; the demurrer, being too large, must fail: (*Webb v. Baker*, 7 Adol. & E. 841; *Boyce v. Williams*, 2 Jones, 214, Exch. Rep.) And there is no such thing as a demurrer to part of a count. There is no repugnancy. The words are "did then and there feloniously express, utter and declare, by divers overt acts and deeds hereinafter mentioned." "Divers acts" means other than those on the 3rd of June. This is not an averment of two distinct things. It is that on the 3rd June the prisoner did a certain act, and on another day another, which is evidence of the same compassing: (*Rex v. Shepherd and Agnew*, 5 E. 244.) I submit that there is no inconsistency nor repugnancy. In *Townley's case* (Fost. Cr. L. 7), it was objected that the overt acts were charged in the indictment to have been done on the 10th October, but that all the evidence was of overt acts subsequent to that date; and in *Lord Balmerino's case* (Fost. Cr. L. 9, *note*), the same objection was made, but Lord Chief Justice Lee delivered the unanimous opinion of all the judges, that the day is not material, provided the treason be proved to have been committed before the finding of the bill, so that it is quite clear that under the statement in this indictment we are entitled to give in evidence publications of a different day from the 3rd June. It is not like the description of the date of a written instrument. In an action on a bill of ex-

change, if you say that on such a day the party made his bill of exchange, you may give evidence of a bill made on another day, though if you describe the bill as bearing date on such a day, you cannot give in evidence a bill of a different date. [PERRIN, J.—Have you any authority for that? It is a question of the distinction between pleading and evidence.] Not exactly. [PERRIN, J.—There are precedents under 36 Geo. 3—one in *Thistlewood's case*, where it is alleged that he did compass, &c., on a certain day, and on divers other days both before and after, but there is no authority that I am aware of for the form adopted here.] In *Thistlewood's case* it is said that, by divers other acts, &c., he did then and there express, &c., and at different other days and times. It has been contended here that the “then and there” means the very day itself: (2 Hawk. c. 25, s. 82.) The act of publishing may be done on several different days: it is otherwise of the compassing. The act of publication is not like the act of compassing, but if the construction contended for at the other side is the true construction of this document, the court, I respectfully submit, will reject the portion which is inconsistent, will reject the words “then and there,” and the indictment will run that on the 3rd day of June he did feloniously compass, &c., by divers overt acts and deeds hereinafter mentioned, that is to say, in order to perfect, fulfil, and bring to effect his most evil and wicked felony, he the said Charles Gavan Duffy, on the said 3rd day of June, in the said 11th year of the reign aforesaid, and on divers other days and times after the said 3rd day of June, to wit, on, &c.: (*Ring v. Roxborough*, 2 C. & J. 418, and 2 Tyr. 468.) But the objection does not apply to the first overt act, and therefore this demurrer cannot be sustained. [PERRIN, J.—Have you any case for that except *Layer's case*?] *Lowick's case* (13 St. Tr. 267.) It is contended that the 5th and 6th counts are bad for not setting out the overt acts, but in *Thistlewood's case* and *Francia's case*, and the bulk of the precedents under a general statement, such documents have been received in evidence. *Thistlewood's case* is an important authority. Evidence was given of acts on several other days and times. I admit that under this count the party has not the advantage of taking the opinion of the court on the sufficiency or insufficiency of the publication, as in cases of libel; but in treason cases the same thing occurs. In *Watson's case* the count was for levying war. (c)

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.

January 4, 1849.

PERRIN, J.—The prisoner is charged under the statute of 11 Vict. c. 12, with feloniously compassing to depose the Queen, and to levy war against Her Majesty. There was another indictment for the same offence pending in the county of Dublin; this,

(c) The learned Attorney-General also argued that, in the event of the Court overruling the demurrer, the Crown were entitled to final judgment. This part of the argument, and the cases cited upon it, it has not been considered necessary to print here, as they will be found fully reported in pp. 25-30 *ante*; and see also note, p. 332, *post*.

REG.  
v.  
CHARLES  
GAYAN DUFFY.  
—  
1849.  
—

*Crown and  
Government  
Security Act—  
Indictment.*

Judgment of  
Perrin, J.

the court is of opinion, should be quashed. This indictment contains six counts—the first four charging several distinct matters, publications, and overt acts, as the expression of the compassing. The 5th and 6th charge the same matter more generally, and to each there was a several demurrer and joinder therein. The 1st count charges that the prisoner, on the 3rd of June, in the 11th year of the Queen, did compass, imagine, and intend to depose the Queen, and that compassing did express, utter, and declare, by feloniously publishing a certain printing or writing, which said printing contains, among other passages, the several following ones, and to which it is material to advert:—"When the French revolution raised the hopes of Ireland in a speedy deliverance, I asked to have done what seemed to me to be the manifest duty of the hour. I proposed that the two existing Repeal associations should be forthwith dissolved, and a new one, kindled with the new spirit of the times, set in their place; that it should be open to all repealers without pledge or qualification; that its government should be committed to a legislative council of three hundred repealers, the foremost in Ireland for capacity and devotion; and its direction to an executive committee of five, competent to act as the cabinet of the movement; that commissioners should be sent forth to organize the entire country into local clubs; that permanent agents should be established in England to organize the Irish, and the friends of Ireland, in every city in that island. It was my conviction that nothing ought to be left to chance which forethought could prepare; that every foot of Irish soil ought to be made vital with the passion for daring changes, and for results that glowed in the heart of the capital; that the hot blood engendered there ought to be sent burning and thrilling to the coldest extremities; that organization ought to be extended and systematized, till literally every hamlet and parish had its club, every town and city its brigade of clubs. Had this been done, Ireland, instead of pleading a shameful want of forethought, would at this hour possess a popular cabinet, treasury, and legislative council, trusted by the whole country, and a national guard of disciplined clubs." "Give Ireland a native power which she can love and obey, and you give all she requires for strength or victory. A popular executive set up by the Irish nation would overtop the officials of Dublin castle in a week, and, if they are worthy of their office, would centre round themselves the love and reverence of the whole nation." These passages are set out as expressive of the compassing charged, and with the intent to depose the Queen. In the second publication we find the following extracts:—"Frankly we go into this league to establish clubs universally, to regain for Ireland the generous aid of our foreign friends, to compass a national council of three hundred elected representatives, fit to confront the majesty of England, or the sterner majesty of death." "The ministers of Ireland prefer a civil war to an Irish legislature—the base aristocracy of Ireland have declared for the minister, and against the soil on which they live—the Irish government now becomes simply

a question of force, force of will, and force of organization. It has ceased to be a debatable question, a propagandism, or a demonstration. With petitions, motions, resolutions, and all oratory of the remonstrative order, it is done for ever. Does Ireland really will national institutions? If so, Ireland must prepare herself to assert them by union and by action. Every town, village, and barony, must have its club, every club its committee, every committee its plan of operations, adhering with the general policy. When this is done, and Ireland, from end to end, is bound together by a spirit of sympathy, and cords of combination, it will be a feasible work to emancipate her from the iron yoke, and give her whatever form of government the national will decrees." That expressly shows an intention to depose. The charge in the 1st count against the prisoner is, that he had compassed the deposition of the Queen, and expressed that compassing or intention by the articles therein set forth. I am of opinion that the passages I have read do not only contain evidence of the existence of that design, but also an advice to others to effect that purpose. To seek to change the Government shows an intention to depose the Queen, and is an overt act evidencing that intention. The count charges an intention of compassing to depose the Queen, and of creating a popular revolution, which was treason under the 36 Geo. 3. It is clear that it was not the intention of the Legislature to deprive the Crown of the protection it was theretofore entitled to, and the 5th section of the Act of Victoria expressly provides that it shall be lawful in any indictment for felony under the act "to charge any number of the matters, acts, or deeds, by which such compassing or any of them shall have been expressed," &c. It is argued for the prisoner that the word indictment is not equivalent to count, but that it might mean that the acts or deeds should be charged in several counts. No authority has been shown me that the word "indictment" means one and not several counts; and if that were so, there would have been no necessity for any legislative enactment, as the different offences might, previously to the passing of the act, have been set out in several counts. In 1 Hale P. C. 122-123, it is said that more overt acts than one may be laid in an indictment, and then the proof of any of them so laid—being in law sufficient overt acts—maintains the indictment. Indictment there means count, and must be taken so under this act. It has been argued that there is a distinction between the offences created under the 36 Geo. 3 and the 11 & 12 Vict. c. 12. That under the first act the compassing alone was the offence, but that under the latter there was the compassing and the expression of it. No authority has been cited to establish that distinction, and it is in my mind untenable. The explanative construction and import of the same word in this act must be the same as in the 36 Geo. 3. It cannot mean different things, and to sustain this argument we must go further, and hold that it means different things in the same act—that is, in the section extending the 36 Geo. 3 to this country, it should have one meaning,

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.

Judgment of  
Perrin, J.

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
*Crown and  
Government  
Security Act—  
Indictment.*

Judgment of  
Perrin, J.

and in the 5th section another. That what would be a good count in treason should be bad when changed from treason to felony. The crime, the offence, under the 36 Geo. 3, is the same as that under the 11 & 12 Vict. c. 12. The thing prohibited is the same, viz., the compassing, and the expressing of it by publication, or by any matters, acts, or deeds. It is equally erroneous to hold that the publication is not included in the word "matter." An indictment under the 36 Geo. 3, would be erroneous, if the charge was of compassing alone, and would be insufficient if the overt act were not expressed. The same rule must be necessary under the 11 & 12 Vict. c. 12; under either act it is necessary to express the things or matters expressive of the offence. If, therefore, the compassing alone be the crime, it is erroneous and over-refined to say that there are three felonies;—by publishing, by open and advised speaking, and by any other act or deed. There is nothing to show that the expression should be laid in more than one count, or that the overt acts are to be laid otherwise in felony than in treason. The proper mode is to set out the overt acts in the counts, charging the felony of which they are the expression. Authorities have been referred to, but they do not support the position they were cited for, and this count is conformable with the practice and precedents in cases of perjury and conspiracy. No possible inconvenience or disadvantage can possibly arise to the prisoner, and so far the case of *Reg. v. Martin* (3 Cox Crim. Cas. 447) is in point; therefore I think that there is nothing in this objection. The second objection is, that the count is too general, in not specifying fully the words charged, and that there is no colloquium or inuendo expressive of the intent charged. I think that the passages themselves plainly express the intention charged, therefore no inuendo is necessary. In *Clements v. Fisher* (7 B. & C. 459), though the count was held to be bad for not setting out the meaning, the court says that such an allegation would not have been necessary, if there had been in the libel set out anything which clearly applied to the plaintiff, or any distinct inuendo so applying to the libellous matter, or if, upon the perusal of the matter set out it had manifestly appeared that it related to the libel in respect of which the plaintiff had recovered damages. In the present case it is quite impossible to read the passages I have referred to, without seeing that they do directly refer to the objects of compassing, and that they suggest the means of carrying it into effect. "The problem that lies before us is to seize the whole force of the country—now scattered and chaotic—to reduce it promptly to order, and discipline it to system, that it may be wielded like a sword against England. We are playing for the life of Ireland, and anything short of this is flinging away the last hope of the Celtic race." The court is to read these words as they would be read elsewhere, according to their literal meaning. Can it be suggested that the intent was not to depose the Queen? What averment could make the intent clearer than that passage itself has expressed it: "A popular executive, set up

by the Irish nation, would overtop the officials of Dublin castle in a week, and if they are worthy of their office, would centre round themselves the love and reverence of the whole nation." That expresses an intention in the prisoner, and an advice to others to seek to change the Government. That could not be done without levying war and deposing the Queen. It has been suggested, but it was not shown, that some other meaning might be attributed to them. The case of *Reg. v. Martin* is an authority upon this point also. The case is even stronger; for there the passages were not, as here, either specified or selected. I cannot conceive the necessity for expressing the intent; there is no ambiguity. In *Reg. v. Agnew* (5 E. 258), the rule is thus stated: "There is no rule that other words shall be employed than those in ordinary use, or that in indictments, or other pleadings, a different sense is to be put on them than they bear in ordinary acceptation:" "And if, where the sense may be ambiguous, it is sufficiently marked by the context, or other means, in what sense they are intended to be read, no objection can be made on the ground of repugnancy, which only exists where a sense is annexed to words which is either absolutely inconsistent therewith, or being apparently so, is not accompanied with anything to explain or define them." In the case of *Rex v. Horne* (Cowp. 672), referred to in the argument, De Grey, C. J., at p. 683, says: "to apply these principles to cases of libel, it may happen that a writing may be so expressed, and in such clear and unambiguous words, as may amount in itself to a libel. In such a case, the court wants no circumstances to make it clearer than it is of itself, and therefore all foreign circumstances introduced upon the record would be only matter of supererogation." In the present case, the passages are not merely capable of being connected with the offences charged, but directly relate to the compassing and effectuation of it, and I approve of the rule cited by Sir Colman O'Loughlin, from Foster's *Disc. on Treason*, c. 1, s. 7, p. 198, that "the words must be published, and that they import such compassing," and applying it to the present case, it appears to me that these passages denote, and are expressive of the design charged, and are in furtherance and contemplation of it. This objection is repeated in another form, viz., that the whole of the writings should be set forth, and that nothing should be left to intendment. If the whole were set out, it would be most injurious to the prisoner to have voluminous and long continuances set out upon the record, and, as expressed by Lord Denman, "a grievance and an oppression." The doctrine is also correctly stated in *Sacheverell's case* (15 St. Tr. p. 1), and this indictment follows that course, and gives the prisoner an advantage by selecting the passages relied on, and I do not think the Attorney-General could rely on other portions of the publication, than those set out to support his case. Several cases were cited in which it was necessary to set out the whole matter of the publication, as in indictments for administering false oaths, &c. They do not apply to the present case. I agree with the doctrine of Lord Hale

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
Crown and  
Government  
Security Act—  
Indictment.

Judgment of  
Perrin, J.



REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.

Judgment of  
Perrin, J.

(1 P. C. 109), "that the words must show not only a purpose, but a settled intention in the mind; I will test the counts by this rule; it charges the prisoner with compassing to depose the Queen, &c., by publishing certain writings, and I find by the passages I have referred to, which appear to me plainly to import the intention imputed to them, that the intention of all these is so clearly set out as to denote the settled purpose necessary to constitute the charge; but if the words do not of themselves express the guilty purpose, then it should be shown; I think that the count does express the compassing, and that the prisoner evidenced the intention of perfecting that compassing by the passages I have referred to. In *Thistlewood's case* (33 St. Tr. 684), Abbott, C. J., in his charge to the grand jury, speaking of the 36 Geo. 3, says, "that the intention shall constitute the crime, which shall be manifested by some act tending towards the accomplishment of the criminal object." I adopt that view; it is not merely necessary that a vague intention should be expressed in the count, but a settled purpose. What was there set out was, in the object of law, an overt act, and evinced a settled purpose to effect the intention charged: *Despard's case* (28 St. Tr. 345.) In *Sacheverell's case* (15 St. Tr. 1), two passages were referred to as not being set forth; he was impeached for preaching a sermon against the then recent revolution in England. The question was referred to the judges, and from the resolution arrived at, it will distinctly appear that the objection was not that the passages were not fully set out, but that none were specified; in fact, the very thing done in the present case was that, the want of which was complained of there: *Rex v. Mason* (14 Leach, 487), was relied on to show that the passages should be set out, that the court may see if the offence is that contemplated by the statute creating it; and *Clements v. Fisher* (7 B. & C. 459), was cited to the same effect. It was also said that the whole publication should be set out, in order that the court might be in a position to measure the punishment to be inflicted. It is in the power of the court to have the whole document before it, and to use it for that purpose. Another argument was urged, that the whole publication should be set out, in order that the true meaning might be arrived at. I think the passages of themselves show that. It was further argued, that the grand jury may not have found the bill upon the passages alleged to be expressive of the offence. It is not to be presumed that the grand jury did so, and, in my judgment, it is more likely that both the grand and petty jury would be more embarrassed by long statements, than those confined to particular charges, and that justice would be better administered, and the prisoner have a better opportunity of defence than if he were distracted by passages not bearing on the case, or under the consideration of the prosecutor; and in addition to this, the authorities and precedents appear to show plainly that this course is proper, and in *Sacheverell's case*, to which I have already referred, the objection was that no entire passage of the sermon had been set out. The objection was not

allowed, and this count appears to be entirely in accordance with that authority, and precedents to the same effect will be found in *Stockdale's case* (22 St. Tr. 237); *Finnerty's case* (26 St. Tr. 901); *Williams's case* (26 St. Tr. 653); and particularly in *Francia's case* (15 St. Tr. 897), where the same words, "containing among other things" are used. And in *Thistlewood's case* (33 St. Tr. 681), a part of the proclamation only was set out. For these reasons it appears to me that this count does set forth an offence within the statute; that there is no necessity for any inuendoes to support it; and, therefore, there must be judgment for the crown upon the 1st count. The 2nd count was objected to as being repugnant, and inconsistent as to the time, in stating that the prisoner did compass on the 3rd June, and the said compassing did further express, on the 17th June, and so on several subsequent days; and secondly, it is objected that the publications are set out as overt acts of felony. It is not necessary to give any opinion on this objection, as I am of opinion the first is well founded. The expression on the 17th, of a compassing on the 3rd, is repugnant and insensible, and this is clearly established by authority; in 2 Hawk. P. C. 324, it is said, "if an indictment lay the offence on an uncertain day, or impossible day, or where it lays it on a future day, or lays one and the same offence at different days, or lays it on such a day as makes the indictment repugnant to itself, it is void." The reading of that passage is, that if any portion of the count be repugnant to itself it is bad; and the case of *Rex v. Agnew* and the authorities there cited, support this view. I do not think this defect can be successfully obviated, but on the authorities I think that all the charges subsequent to the first overt act must be rejected, that the count may be sustained with respect to the overt acts laid on the 3rd of June, and prior to that day. During the argument I thought that this course of pleading was that objected to in *Thistlewood's case*; I find I was in error. The statement of the compassing is on a particular day and on several days both before and after. That was not repugnant. On these authorities I think the second and subsequent overt acts are repugnant and inconsistent, and must be rejected, but, according to the authority of Lord Holt, the first is not consequently to be rejected. The second objection is not well founded. The publications are well laid as overt acts. It will appear on reading the averments charging the publications that it is charged that they were published in order to carry out the alleged compassing; that they were charged to have been used as an encouragement or incentive to others and to create revolution. I think on the authority of Hale P. C. 118; Foster 119; of Lord Ellenborough in *Thistlewood's case*, and of Bayley, J., in *Watson's case*, that these publications are properly laid as overt acts. So far as this count is bad, the demurrer should be allowed; and perhaps the proper course would be to say that so much should be allowed and so much should be quashed. The cases cited to show that where a demurrer is too large, it should

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
Crown and  
Government  
Security Act—  
Indictment.

Judgment of  
Perrin, J.

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.

Judgment of  
Perrin, J.

be overruled, are applicable to civil cases only. I cannot hold the same rule in criminal cases. I think the demurrer is to be allowed to that portion which is bad. The rule to be pronounced on the 1st count governs the 3rd, and that on the 2nd governs the 4th. The next objection is to the 5th and 6th counts; first, that they are repugnant and inconsistent in point of time, and secondly, that the contents of the overt acts should be clearly shown. The rule I have made on the 2nd count applies to this; therefore all the charges subsequent to that on the 3rd of June must be rejected; the other objection I do not think to be well founded. The count charges that the prisoner "did feloniously publish divers other printings," and containing "amongst other things, incitements, encouragements, advices and exhortations to the liege subjects of the Queen to rise and rebel treasonably," &c. It appears to me that this count does charge divers overt acts on the 3rd of June, the tendency of which is plainly the accomplishment of the deposition of the Queen, and I think such overt acts might be given in evidence. And as to the objection that the overt acts should be fully set out, I think that would be unnecessary, and that it is quite sufficient to charge the intent and purpose. There are no authorities cited to the contrary, with the exception of the alleged opinion of the Lord Chief Baron and Mr. Baron Pennefather. They had expressed no such opinion; they felt some difficulty not as to whether it was evidence but whether it could be used as evidence to support another count; as, to use it so, would be a surprise upon the prisoner, by using evidence not charged, but they offered to receive the evidence if the verdict were taken on the count in question, and a count of this nature will be found in *Francia's case* (15 St. Tr. 903) decided shortly after *Sacheverell's case*; and also in *Layyer's case* (16 St. Tr. 95, 96), *Watson's case* (32 St. Tr. 1), and *Thistlewood's case* (33 St. Tr. 697.) The indictment is in the same way; I cannot, therefore, hold it necessary to specify the particular words; the demurrer must, therefore, be overruled on this ground as to the first overt act; and the same rule will apply to the 6th count.

RICHARDS, B.—After the judgment that has been pronounced by my brother Perrin, it is not my intention to go at any length into the minute and technical points of pleading that have been raised upon the demurrer in this case; but there are some new and important questions involved in the arguments that have been addressed to us; upon those questions I propose to offer a few observations. It is insisted by counsel for the prisoner that all the publications relied on and stated in the indictment as expressive of the guilty compassings of the defendant, should be set forth with the same certainty that it is necessary written or printed matter should be stated in an indictment or action for a libel, for it is said that under the provisions of 11 & 12 Vict. c. 12, s. 3, the published matter is made part and parcel of the crime itself—part of the *corpus delicti*, and we have been referred to the several cases as reported by Mr. Hodges, of *Reg. v. Martin*, and

*Reg. v. O'Doherty*, and to the expressions of the several learned judges before whom those cases were respectively tried, and it must be admitted that the language attributed to the learned judges who presided on those several occasions, does give colour to the position insisted on by counsel for the prisoner. If the expressing of the compassing, by matter published or written, is to form, in the sense contended for, a part of the crime, it is difficult to understand upon what principle of law the prosecutor can be excused from setting out in terms in his indictment that writing or printing. The cases to which we have been referred, from *Sacheverell's case* downwards, establish the position that where the written or printed matter forms part of the *corpus delicti*, it should be set out distinctly, and in terms so that the offence charged may appear upon the record, and be judged of accordingly. But writings relied on, in cases of treason, for the purpose of establishing the guilty intent, have never been considered—at least never that I am aware of—to come within the principle established by the class of cases to which I have last adverted, but the contrary, as will appear by reference to various very eminent writers on the law of treason, and to adjudged cases. And first, with respect to the course of pleading adopted in prosecutions founded on the statute of Edward 3, I would refer to Foster c. 1, s. 1, p. 194, where, speaking of the crime of compassing or imagining the death of the King, or of his Queen, or eldest son, he writes thus:—“The words of the statute descriptive of the offence, must be strictly pursued in every indictment for this species of treason; it must charge that the defendant did traitorously compass and imagine, &c., and then go on and charge the several overt acts as the means employed by the defendant for executing his traitorous purposes. For the compassing is considered as the treason, the overt acts as the means made use of to effectuate the intentions and imaginations of the heart.” Undoubtedly by the common law, as well as by the express provisions of 7 Will. 3, no evidence was admissible of any overt act that was not laid in the indictment, that is to say, no overt act of a distinct nature from the act alleged, though falling under the same head or class, was allowed to be given in evidence where not laid. But facts and circumstances, evidence falling within, and going to support, the general overt act alleged in the indictment, were receivable, though not expressly laid: (*Rookwood's case*, 13 St. Tr. 139; *Lowicke's case*, *ib.* 267; and *Francia's case*, 15 St. Tr. 93; also *Deacon's case*, 18 St. Tr. 365, and Fost. C. L. p. 9.) All those were cases founded on the statute of Edward 3, and were decided before the 36 Geo. 3; and many other cases of a similar kind could also be referred to for this purpose if it were necessary. But, subsequently to the 36 Geo. 3, cases involving the same principle have also occurred, and a like doctrine appears to have been held and laid down by the judges in regard to the manner of stating the overt acts and publications expressive of the guilty compassings of the party charged as that which prevailed before the passing of the act of 1795; accordingly,

REG.  
v.  
CHARLES  
GAVAN DUFFY.

1849.

Crown and  
Government  
Security Act—  
Indictment.

Judgment of  
Richards, B.

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
*Crown and  
Government  
Security Act—  
Indictment.*

Judgment of  
Richards, B.

on looking into the charge of Mr. Justice Bailey to the grand jury before whom the bills of indictment in *Watson's case* were to be laid (32 St. Tr. 5), I find that he, in the most express terms, draws the distinction between treason and the means by which the treason is expressed and by which it is to be established. His words are these:—"In order to support those different acts, the law expects that what are called the overt acts shall, with reference to most of these treasons, be stated in the body of the bill of indictment to be preferred. These overt acts do not constitute the treason; that is comprised in the compassing the King's death, in the compassing the deposal of the King, in the conspiring to levy war, or in the actual levying of war; but these, which are called overt acts, are necessarily introduced into the indictment, and are the evidence by which the charge is afterwards to be supported; and they are introduced into the indictment, that each person against whom the charge is made may have the opportunity of knowing, beforehand, what is the evidence by which he is affected, in order that he may prepare himself to meet that evidence." And it is to be recollected that these observations are made generally, and as well with regard to treasons under the act of 1795 as under the act of Edward. Again, Chief Justice Abbott, in charging the grand jury in the year 1820, before whom the bills of indictment were sent in *Thistlewood's case* (33 St. Tr. 684), goes into a very full disquisition on the law of treason, under both the statute of Edward and of 36 Geo. 3, and proceeds thus:—"You will have observed that, in the several descriptions of offence which I have enumerated (except the levying war mentioned in the ancient statute), the crime is made to consist in the compassing, imagination, or intention (which are all words of the same import), to perpetrate the acts, and not in the actual perpetration of them." And the indictment in that case (the form of which is given in pp. 701, 702, of the same book), is in conformity with the rule of pleadings so laid down by both these learned judges. Since the passing of the 11 Vict. the cases that have occurred are, perhaps, too few to be regarded as establishing any law or course of pleading under that statute, except so far as the judgment of the Court of Queen's Bench in *Reg. v. Martin*, to which we have been referred on the part of the Crown, may be considered as having done so. But let us look to the two corresponding sections in the acts of 36 Geo. 3 and 11 & 12 Vict., and collate them together; and on doing so, they will be found in principle the same, and, indeed, alike in all respects, save that, in the statute of 36 Geo. 3, the crime which is the subject of the present indictment is declared to be treason, and in the Act of Victoria it is declared to be felony; and save that the words "open and advised speaking" are introduced into the later statute, and are not in the former; but that portion of the recent act upon which any question as to pleading could be supposed to turn, is, with the exception that I have mentioned, *totidem verbis* with the former statute. And it certainly does not appear to me (though a good deal of argument has been expended on the sub-

at the introduction of open and advised speaking, as one of  
 es of expressing a guilty intention to depose the Queen,  
 or ought to make any difference in the construction which  
 r words in the same member of the section would and  
 receive, in case the words "open and advised speaking"  
 been introduced into it, and for this reason amongst others,  
 n and advised speaking might at all times, under circum-  
 have been relied on as an overt act in treason. Let me  
 ever, be misunderstood in this. I do not say that open  
 ed speaking, or any speaking, could formerly, nor can now,  
 l on for that purpose, unless the words used have relation  
 determined purpose of a treasonable, or, we may now say  
 erence to this act of Parliament, of a felonious character,  
 or about to be undertaken, or words of advice or persua-  
 ommit such offence; and I should hope those words in the  
 tute will not at any time receive a more extended con-  
 than has already, upon the fullest consideration, been  
 law to the terms "open and advised speaking," by the  
 learned judges in England, who have had to consider and  
 their import and meaning. It therefore does strike me,  
 introduction of those into the 3rd section of the act, was  
 more than was implied in the former statute, and in sup-  
 that view of the case, I would refer, first, to Sir Michael  
 Discourse (c. 1, s. 7, p. 200), where he says, "As to  
 ords supposed to be treasonable, they differ widely from  
 in point of real malignity and proper evidence. They are  
 e effect of mere heat of blood, which in some natures  
 e well disposed, carrieth the man beyond the bounds of  
 and prudence. They are always liable to great miscon-  
 , from the ignorance or inattention of the hearers, and too  
 a motive truly criminal." And, "therefore, I choose to  
 o a rule which hath been laid down, on more occasions  
 , since the revolution, that loose words not relative to any  
 sign, are not overt acts of treason;" but words of advice  
 asion, and all consultations for the traitorous purposes  
 of in this chapter are certainly so—they are uttered in  
 lation of some traitorous purpose actually on foot or  
 , and in prosecution of it. And next to the language of  
 justice Holt, on the trial of *Charnock and others* (12 St. Tr.),  
 ted in *Despard's case* (28 St. Tr.), I would also refer to  
 llenborough's judgment in *Despard's case* (p. 487 of the  
 k), where, in speaking on this subject, he expresses him-  
 :—"It has been urged that the crime consists only in  
 nd that words are not of themselves overt acts of high

If it be said that loose words referable to no particular  
 words merely calumnious, or seditious words expressive of  
 le and angry mind, and of sentiments highly indecent and  
 in a subject towards his sovereign, but words neither  
 g or conducing to the execution of any definite purpose of  
 able kind on his own part, nor persuading or exciting

REG.  
 v.  
 CHARLES  
 GAVAN DUFFY.  
 —  
 1849.  
 —  
 Crown and  
 Government  
 Security Act—  
 Indictment.

Judgment of  
 Richards, B.

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
*Crown and  
Government  
Security Act—  
Indictment.*

Judgment of  
Richards, B.

others to concur in the execution thereof in theirs; I readily admit, that loose words of this description are not to be considered as constituting overt acts of high treason, and that it would be too much to infer from the random and careless, though highly blameable, use of expressions of this kind, so mischievous and abominable a purpose as the destruction of the King. But if words of this kind are used at meetings held for the purpose of forwarding designs of a treasonable nature, and if they are addressed to persons with an intent to excite, and to confirm them in the prosecution of measures which have for their declared object the assassinating or deposing of the King by force and arms; and where words are the immediate vehicle by which treasons such as these are communicated, and by which they are sought to be carried into full completion and effect, it never was, since the promulgation of law in this land, by any one lawyer, ever doubted that words of this nature, uttered for such a purpose, at such meetings and consultations, and being themselves the very instruments and means of exciting other persons to take part in measures which had for their end and object the personal destruction of the King, were in their very nature and essence the clearest and most absolute overt acts of high treason that can be stated. This point never yet admitted of a doubt; it never was questioned—it never can be so.” Now I take it, we must assume that the Legislature was aware of the state of the law, and of the established course of pleading under the 36 Geo. 3, at the time of the framing and passing this act (11 Vict.), and was aware that the words used in the 36 Geo. 3, did not make the expressing of the guilty compassing in law part of the crime in the sense contended for, and if it was intended to make such an important change in the law as that insisted on, I apprehend the Legislature would not have followed so exactly the words of the previous statute, upon which an opposite construction to that now contended for had been put. The word “other” does not precede the words “overt act,” in the 36 Geo. 3, no more than in the 11 Vict., and yet the publishing of any printing or writing was in all respects placed upon the same footing as any other overt act under that statute. Under those circumstances, I feel myself bound, upon the question now under consideration, by what has been laid down by former judges, and by the decisions in the cases of treason to which I have already referred, and I therefore am of opinion that although the printing or writing relied on, as well as every other overt act, should all be stated in the indictment in this case with convenient certainty as they should in treason, yet that publications such as those referred to in this indictment need not be set out *verbatim*, or with that strictness that would be necessary in the case of libel. But it has been said, and truly, that a party tried for felony under the 11 Vict. is, by the express terms of the 7th section, protected from a prosecution for treason upon the same facts upon which he had been tried for felony. And it has been argued, that unless the writings and matter relied on are set out in the indictment,

as strictly as would be necessary in the case of libel, it will be impossible for a defendant to avail himself of a plea of *autre fois* acquit. With respect to that argument, I would say, in the first place, that if the indictment be as certain and precise in regard to the matters charged to make out the felony, as would, before the recent act, have been sufficient in a prosecution for treason, upon the same facts, it is plain that the party is as well protected now from a double prosecution for felony and treason, as he was before from two prosecutions for the same alleged treason; and as we never heard of a man's having been (even in the worst of times), indicted twice for the same alleged treason, I must confess I do not see the reason nor necessity for the Legislature putting him in a different situation in that respect, than he would have been in before the recent statute; but, inasmuch as all the overt acts must, as I have already said, be stated in the indictment with sufficient certainty to inform the party charged of that which is to be relied on against him, and as that is necessary both in an indictment for treason as well as in an indictment for felony, I see no real difficulty in a party availing himself, by plea with proper averments, of the provision to which we have been referred in the 7th section, if at any time, so outrageous an attempt should be made as to prosecute a party, first, for felony, and afterwards for treason upon the same facts. The next objection which I think material to notice is, that of alleged duplicity in the indictment, by reason that several different publications have been relied on in the same count, in order to make out the compassing and guilty intention of the prisoner. But what I have already said, as to the nature and essence of the crime, goes far, if I am right in that, to dispose of this objection also; a man may declare the same guilty intention by several distinct publications; nay, he may declare or express his intention, partly by writing, or by printing and publishing, and partly by open and advised speaking, and partly by some other overt act or deed, and all those several matters may be necessary to make out the case against him, or at least all may be relied on for that purpose. It requires no great ingenuity of mind to imagine a case in which those several matters may be so linked and connected together, and may all converge so completely to one point, that the statement of each may be in a manner necessary to show the bearing of, and to explain the whole. And, I think it very plain, that the Legislature contemplated that it might be necessary, as no doubt it might, to resort to means as compound as I have suggested, to make out the offence. On turning to the 4th section, a provision of a peculiar description is made with respect to cases where the guilty intention is expressed by words "only." The word "only," as used in that section, showed that it was considered by the framers of that act that the felony may be established partly by open and advised speaking, and partly by other means. But it may be said that, in the case I have put, I have supposed a necessary connexion between all the matter suggested all converging

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.

Judgment of  
Richards, B.



REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
*Crown and  
Government  
Security Act—  
Indictment.*

Judgment of  
Richards, B.

to the one point, and each link in the chain depending on the other, and that here that does not appear to be the case, and perhaps it does not. But the argument that each separate expressing of the same guilty intention, by a different and distinct publication, makes a new crime, is put out of the way at once, if I am right in likening this offence, in its essential nature, to that of treason under the 36 Geo. 3, though mitigated in character. Indeed, the proposition that a new crime could be eked out by each fresh expressing of the same compassing, is so extravagant, and so difficult to be reconciled with any principle of law or justice that I am aware of, that I think the announcement of such a doctrine carries its own refutation with it, and, indeed, goes far to prove that felony, under this act, can and ought no more to be considered, in point of law, as compounded of the guilty compassing and the means adopted for expressing the same, than treason could be compounded of the same two things under the 36 Geo. 3. To construe the act in the way contended for on the part of the prisoner, and to hold that each and every publication of written or printed matter, expressive of the same compassing, would be a new crime, would multiply offences greatly under this act, and would, in my mind, be a most cruel and mischievous construction, and a construction that could not fail to operate most oppressively and unjustly upon the subject, as must be obvious to every one. But the 5th section removes all doubt upon this part of the case. It is manifest that the meaning of the 5th section is, that any number of "matters, acts, and deeds, by which such compassings," &c., "or any of them, shall have been expressed, uttered, or declared," may be charged in the same count in the indictment. The section would be useless if it was introduced to allow different matters of the description mentioned to be introduced into different counts in an indictment. The case to which we have been referred on the Embezzlement Act, has no bearing on the subject. In that case no one act of embezzlement could be aided, or in any way worked out, by proving any other act of embezzlement. Each act charged was perfectly independent of the other, and the *corpus* of the crime in each case was the particular act of embezzlement charged, and not a general intention or design to embezzle. I therefore think it right that the different acts of embezzlement, neither having any legal connexion with the crime involved in the other, should be stated in different counts. If, indeed, it had been enacted that a party guilty of three several acts of embezzlement within a certain limit of time, should be subject to a greater punishment than if only guilty of one; it might be necessary in that case to charge the three several acts in the one count, as in the case with regard to some other offences. But this is not the end or object of the act. The punishment is the same whether the party be guilty of one or three of those acts of embezzlement; but, for the sake of convenience, the prosecution is allowed to charge three different acts of embezzlement, if committed within a certain

e, in the one indictment, and the usual, and I think proper  
 rse, is to do it in different counts. The cases referred  
 in this statute do not, in my opinion, apply to any of  
 questions that have been raised before us. As to the objection  
 ertain of the counts in the indictment, on account of the in-  
 luction of the words "amongst other things," in setting out the  
 cles and published matter, if I am right in the view which I  
 e taken of the act generally, and that no more certainty is  
 ssary in this case than would be necessary in an indictment  
 treason, the introduction of the words "amongst other things,"  
 not be relied upon as making the count bad. But in any case,  
 ould think the introduction of the words would not vitiate the  
 nt, if sufficient appeared on the record to support, *primâ facie*,  
 charge contained in the count; and I find those words  
 amongst other things," or words of similar import, adopted in  
 ing out matter in cases where the matter professed to be set  
 must be stated exactly and precisely. In libel cases,—for  
 ance, *Paine's case* (22 St. Tr. 360), *Holt's case* (same book,  
 0), both for seditious libels; also *Williams's case*, for publishing  
 asphemous libel, viz., "*Paine's Age of Reason*" (26 St. Tr. 606);  
 in the several other cases to which my brother Perrin has  
 rred, and which I think it unnecessary again to mention. Then,  
 o the objection on account of the omissions of a proper collo-  
 um, and of averments and inuendos. I admit all these are  
 ssary where the sense of the matter is doubtful; but, in my  
 ion, in this case the sense and meaning of the matter intro-  
 ed into this indictment may be fairly enough collected from  
 passages themselves, without the aid of colloquium, averment,  
 uendo, beyond what have been introduced into the indictment.  
 h respect to the objection, that several of the articles relied on  
 he indictment, being part of the published matter charged and  
 gned as overt acts, are inconsistent with the time at which the  
 ged felony has been laid, my opinion is, that there is an incon-  
 ency in that respect, in certain of the counts in the indictment.  
 in each count there is one overt act well laid; and with regard  
 he publication so well and sufficiently laid, this objection does  
 hold; and that being the case, my opinion further is, that the  
 r subsequent assignment of inconsistent or repugnant matter  
 in the indictment may be rejected, and ought to be rejected;  
 I do not think such repugnant matter can vitiate the whole  
 nt, the statement of the offence being well laid, and there  
 g one overt act or expression of guilty intention well and  
 ciently laid in each count. Some of the cases to which I have  
 ady referred, and especially the charge of Mr. Justice Bailey  
 of Chief Justice Abbott, support this view of the case. And,  
 addition, I would refer to 2 Hawk. Pl. Cr. (book 2, c. 25,  
 2), and to *O'Connell v. The Queen* (11 Clark & Fin. 379,  
 1 Cox C. C. 530, S. C.), where Lord Denman's interpreta-  
 and reading of Lord Holt's judgment in the case of *Reg.*  
*Rhodes* will be found. It is, however, another question,

REG  
 v.  
 CHARLES  
 GAVAN DUFFY.  
 1849.  
 Crown and  
 Government  
 Security Act—  
 Indictment.

Judgment of  
 Richards, B.

REG.  
v.  
CHARLES  
GAVAN DUFFY.  
—  
1849.  
—  
Crown and  
Government  
Security Act—  
Indictment.

whether we should not guard the prisoner against being prejudiced by pleading over (in case he shall now be allowed to plead, upon which question something still remains to be considered), by reason of those ill-assigned overt acts. Mr. Justice Bailey's charge to the grand jury in *Watson's case*, shows very clearly that the overt acts which are not supported in an indictment for treason, may be rejected by the grand jury in finding their bill, and that they ought to do so, and find their bill on the overt acts that have been sustained before them in proof. Now, I should say that when the court finds some of the overt acts insufficiently laid in the indictment, such ill-laid overt acts ought to be expunged from the indictment, or, in technical language, quashed; and the indictment treated and considered, in all respects, as if no such ill-laid overt acts had been introduced into it. (*d*)

(*d*) The demurrer having been overruled, the Attorney-General having called on the Court to pronounce final judgment upon the prisoner on behalf of the latter, it was contended that the proper judgment was *respondet oster*, and not final judgment. The court directed the question as to the proper judgment to be pronounced to be formally argued, and accordingly it was, on the 13th January, 1849, argued by Monahan, Attorney-General, and Hatchell, Solicitor-General, on the part of the Crown, and Butt, Q. C., and Napier, Q. C., on the part of the prisoner, and after considering the question, the court ultimately (January 18th, 1849) pronounced judgment of *respondet oster*, and the prisoner pleaded not guilty. The arguments and decision on this branch of the case will be found fully reported in pp. 24-30, *ante*, having been published out of their turn in consequence of the point involved being one of so much importance in the administration of the Criminal Law. It will be observed, however, as reference to the judgment of Mr. Justice Perrin (*ante*, p. 30) that the question whether, in all cases of felony a prisoner is entitled after demurring to the indictment to plead over, does not appear to be decided by it. The judgment of the learned judge, which is very brief indeed, appears to rest on the following grounds:—That, as the case of *Reg. v. Serva*, is an authority for holding that in capital cases a prisoner is entitled after demurring to plead over, and as *Gray's case* decides that a prisoner, indicted for a felony which had been capital, is not deprived of the privilege to which he would have been entitled if the capital penalty had not been abolished; therefore, as the offences embraced in the indictment in the present case would, but for the passing of the act of the 12 & 13 Vict. have been treason, the prisoner was entitled to the same privileges as regards pleading over as if he had been capitally indicted. Thus leaving the general question whether a prisoner indicted for felony is entitled, after demurring to the indictment to plead over to the felony, untouched; and it is submitted that the case of *Reg. v. Serva* is hardly a conclusive authority for the existence of the right in capital cases, inasmuch as the course taken by the prisoner does not, from the report of the case, appear to have been objected to by the counsel for the Crown.—REPORTER.

## CENTRAL CRIMINAL COURT.

JANUARY SESSION, 1850.

(Before PATTESON, J., and TALFOURD, J.)

January 10.

REG. v. DRAKE. (a)

*Murder—Indictment—Name—Bastard—Reputation.*

*an indictment for the murder of a child, it was called in one count "Lewis Drake," in another Lewis Tavern, and in a third "a certain bastard male child, named Lewis." It was proved in evidence that the child had been called by its mother (whose name was Drake) and by its nurse "Lewis," and by that name alone it had been baptized. Its nurse had spoken of it to others as Lewis Drake. There was no proof that the mother was married. Her brother, who had lost sight of her for thirteen years, had never heard of her marriage. It was proved, also, that there was evidence from which the jury might infer that the child's name was "Lewis Drake" or "Lewis" alone.*

THE prisoner was indicted in one count for the wilful murder of Lewis Drake. In another for the murder of Lewis Tavern; and in a third count the child was described as a certain bastard male child, named Lewis.

It appeared in evidence that the prisoner was the mother of the child, and sometimes called it Lewis, and by that name alone it had been baptized. It had been put out to nurse by its mother, who then went by the name of Tavern; the nurse used to call it Lewis, and when she learnt the mother's name was Drake she called it Lewis Drake when speaking of it to other persons. The child was two years old. There was no proof that the prisoner was married. Her brother said he had never heard of her marriage, but she had been absent from him thirteen years.

Collier and Parry (for the prisoner) contended that the name of the child was not proved to be that laid in any count of the indictment. As to the name of Lewis Drake there was no proof that it was his real name; on the contrary, he was baptized as Lewis only, and there was nothing shown to entitle him to the name of Drake. The name alleged must be either the true name or one obtained by reputation, but it was not sufficient for this purpose that the nurse had sometimes spoken of him to others as Lewis Drake. In *R. v. Waters* (7 C. & P. 250; 1 Moo. r. Ca. 457), evidence that the child was called Eliza, and that the mother's name was Waters, was held insufficient to support a count which alleged the name to be Eliza Waters. As to the name of Lewis Tavern there is no evidence whatever of the child having such name either in fact or by reputation. The count which

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

REG. v. DRAKE. alleges the name Lewis also alleges that the child was a bastard, of which there is no proof.

1850.

Murder—  
Indictment—  
Name.

PATTESON, J. — There is evidence that the mother went by her maiden name of Drake, and her brother deposes that he never heard of her being married.

*Collier*.—But the prosecution has undertaken to show that the child is a bastard, and the brother's evidence is entirely neutralized by his statement that he has lost sight of the prisoner for thirteen years. The presumption of law in the absence of evidence to the contrary, is, that the child is legitimate: (*R. v. Totley*, 2 New Sess. Cas. 42.)

*Bodkin* and *Clerk* (for the prosecution).—The fallacy of the argument on the other side is in supposing reputation to consist in the calling the child by name, which, in the case of a very young child, is out of the question. In *Evan's case* (8 C. & P. 765), an illegitimate child six weeks old was baptized, and for two days afterwards was called by its name of baptism and its mother's surname, and it was held sufficient to warrant the jury in finding that the deceased was properly described by these names in the indictment. As to the child being a bastard, there was evidence that the mother went by her maiden name,—she was so described in the indictment, and she was there called a single woman. She had pleaded to such a description, and there was, therefore, abundant evidence on both counts from which the jury might find the fact as therein stated.

*Collier* replied, and quoted *R. v. Stroud* (2 Moo. Cr. Ca. 270; 1 C. & K. 187.)

PATTESON, J.—There is no evidence of the child being named Lewis Tavern, and I shall therefore withdraw the second count from the consideration of the jury, but with regard to the other two, I shall leave the case to them. In the case relied on by the prisoner's counsel, namely, *R. v. Waters*, there was no evidence that the child was ever called or known by the name of Waters at all, whilst in *R. v. Evans* reputation of two days was held sufficient. As to the name of Lewis, the child went by that name and was baptized by it. But it is said that there is always a presumption in favour of legitimacy, and this child is called a bastard without any proof that he was one: but it is for the jury to say whether, from the evidence produced before them, they are not satisfied that the prisoner is the mother of the child, and that she was never married. She goes by her maiden name of Drake. She pleads to that name in the indictment, and is there described as a single woman, in addition to which, her brother never heard of her marriage. Whether all this may or may not satisfy the jury that the child was a bastard it is for them to decide, but, undoubtedly, there is evidence for them to consider.

TALFOURD, J., concurred.

*Bodkin* and *Clerk* for the prosecution.

*Collier* and *Farry* for the prisoner.

## CENTRAL CRIMINAL COURT.

APRIL SESSION, 1850.

(Before Mr. Justice ERLE.)

April 11.

REG. v. REGAN.(a)

*Arson—Evidence—Intent.*

*Upon an indictment for arson, with intent to injure the person in occupation of the premises, the prisoner may be found guilty, although his intent is proved to have been to obtain a reward for giving the earliest intimation of a fire at the engine station.*

*Upon such an indictment it is not competent for the prosecutors to show that other fires, of which notice was given by the prisoner, were of a similar nature to the one in question, and different from those of which notice was given by other parties.*

**T**HE prisoner was indicted for maliciously and feloniously setting fire to a certain building, with intent to injure one Joseph Adams.

From the evidence it appeared that the prisoner had given notice of other fires, and had claimed the reward usually paid on such occasions at the engine station, and he had apparently no other motive in setting fire to the premises in question, than the expectation of getting such reward.

*Ballantine* (for the prosecution), proposed to show that the other fires, of which notice was given by the prisoner, were of a similar nature to the one in question, and different from those of which notice was given by other parties. Where the prisoner's intent was put in issue by the indictment, it was always competent to show other acts of a similar kind, and the circumstances under which they had been done.

ERLE, J. was of opinion that the mere fact of the prisoner's having given notice of other fires, and claiming the reward, did not permit evidence to be adduced upon which a presumption could be grounded that he had caused those fires.

*Payne* (for the prisoner), contended before the jury, that if they believed that the prisoner's intent was not to injure the prosecutor, but merely to obtain the reward for giving the earliest information, that he could not be convicted upon the indictment.

ERLE, J.—I entirely dissent from this view of the case. If the prisoner wilfully set fire to the premises, the jury will be perfectly justified in finding that his intent was to injure the person whose property they were, and who would necessarily be injured by such an act, although he might have an ulterior object of obtaining the reward. There have been several cases recently of persons administering poison to others, for the purpose of obtaining the money for which their lives were insured, but no one ever dreamed that because they were actuated by such a motive, they would be

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

REG. v. REGAN. entitled to an acquittal when indicted for administering poison with intent to kill.

1850.

Arson—  
Evidence.

The prisoner was found  
Ballantine for the prosecution.  
Payne for the defendant.

Guilty.

## COURT OF CRIMINAL APPEAL.

June 22, 1850.

(Before WILDE, C. J., ALDERSON, B., PATTESON, J., COLERIDGE, J., and CRESSWELL, J.)

REG. v. WALTER WATTS. (a)

*Larceny — Embezzlement — Shareholder of company — Servant — Evidence.*

*A prisoner was a shareholder in an unincorporated company, and was employed as a salaried clerk by the directors, who appointed and dismissed clerks and other servants, fixed their salaries, and defined their particular duties. The salaries of the clerks were paid out of the funds of the company, and the directors had the charge and custody of all the company's books and papers. The course of business between the company and their bankers was, that the pass-books and paid cheques were returned weekly to the office of the former by their messenger, and it was the prisoner's duty to receive them from the messenger and then to compare them with the books of the company. When this was done the cheques were to be preserved by the prisoner for the company's use. A cheque for 1,400l., purporting to be drawn by the company upon their bankers, was paid by the prisoner into his own private bankers to his account. It was duly paid by the company's bankers, cancelled and entered in the pass-book, and given in due course to the company's messenger with the pass-book, and he delivered them to the prisoner. Shortly afterwards, in consequence of suspicion attaching to the prisoner, search was made amongst his papers for the cancelled cheque, but it could not be found. The pass-book, when examined, showed that the entry of the 1,400l. cheque had been erased. There was no evidence to show that any person, on behalf of the company, had ever drawn the cheque in question, or that it had been drawn upon paper belonging to the company.*

*Held sufficient evidence to support a count charging the prisoner with stealing a piece of paper, the property of Edward Goldsmid (one of the directors), and others.*

THE following case was reserved by Mr. Justice CRESSWELL:  
—The prisoner was tried before me at the Central Criminal Court on the 10th of May, on an indictment of which the following is an abstract:—

Walter Watts: That he, on 26th February, at Saint Mary,

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

Woolnoth, in London, was clerk to George Carr Glyn, and whilst he was such clerk feloniously did steal one order for the payment of money, to wit, for the payment and of the value of 1,400*l.*, belonging to the said George Carr Glyn, his master.

REG. v. WATTS.

1850.

Larceny—  
Evidence.

*Second Count.*—Alleges that said prisoner was clerk to said George Carr Glyn, as and then and there being treasurer of the Globe Insurance Company, and that he did steal one order, &c., belonging to the said George Carr Glyn as such treasurer.

*Third Count.*—Alleges that said prisoner was servant to Edward Goldsmid and others, and that he did steal one order belonging to them, his masters.

*Fourth Count.*—Like 3rd, only instead of alleging the order to belong to Goldsmid and others, alleges it to have been in their possession and power.

*Fifth and Sixth Counts.*—Allege the property to be in William Tite and others, instead of Goldsmid and others.

*Seventh and Eighth Counts.*—Embezzling the order, the property of Glyn.

*Ninth Count.*—Embezzling the order, the property of Goldsmid and others.

*Tenth Count.*—Embezzling 1,400*l.* of Goldsmid and others, his masters.

*Eleventh Count.*—Embezzling the order, the property of Tite and others.

*Twelfth and Thirteenth Counts.*—Stealing a piece of paper belonging to Glyn, his master.

*Fourteenth Count.*—Stealing a piece of paper, the property of Goldsmid and others, his masters.

*Fifteenth Count.*—Stealing a piece of paper in the possession and power of Goldsmid and others, his masters.

*Sixteenth Count.*—Stealing a piece of paper, the property of Tite and others, his masters.

*Seventeenth Count.*—Stealing a piece of paper in the possession and power of Tite and others, his masters.

*Eighteenth, Nineteenth, Twentieth, and Twenty-first Counts.*—Like 7th, 8th, 9th, and 10th, only embezzling a piece of paper instead of embezzling the order.

*Twenty-second, Twenty-third, Twenty-fourth, and Twenty-fifth Counts.*—Stealing an order for the payment of money, the property of the said persons, without alleging the prisoner to be servant.

*Twenty-sixth, Twenty-seventh, Twenty-eighth, and Twenty-ninth Counts.*—Stealing a piece of paper, the property of said persons, without alleging the prisoner to be servant.

It appeared that the prisoner had for many years been employed as a salaried clerk in the office of the Globe Insurance Company, and that he was also a shareholder in the concern. The affairs of the company, which is an unincorporated copartnership, are managed by a body of directors, chosen out of the shareholders; and at the time when the alleged offence was committed, Edward Goldsmid was chairman, and William Tite deputy-chairman, of



RHO. v. WATTS.

1850.

*Larceny—  
Evidence.*

Case.

the directors, and George Carr Glyn was treasurer. The directors appoint and dismiss clerks and other servants, and fix their salaries and the particular duties to be discharged by them, and the directors have the charge and custody of all books and papers belonging to the company. The salaries of the clerks are paid out of the funds of the company. The company had a drawing account at the bank of Glyn & Co., and were in the habit of sending their pass-book on Tuesday in every week to be written up, and their messenger went on the following morning to bring it back, when it was returned together with the cheques and bills paid during the preceding week. The prisoner was the person whose duty it was to receive the pass-book and vouchers from the messenger, and it was his duty, on receiving them, to compare the entries in the pass-book with the books of the company, and to preserve the vouchers for the use of the company if wanted on any future occasion. On the 26th of February the prisoner paid into the London and Westminster Bank for his own account (which he kept there,) a cheque for 1,400*l.*, purporting to be drawn by the Globe Insurance Company on Glyn & Co. It was cashed by Glyn & Co. together with other cheques for the London and Westminster Bank, entered to the debit of the Globe Insurance Company in their pass-book, and delivered, together with the book, on the following Wednesday to the messenger of the company, who delivered the book and cheque to the prisoner in the usual way. On the 4th March, in consequence of some suspicion attaching to the prisoner, a search for the cheque for 1,400*l.* was made during his absence amongst the vouchers in his keeping, and it could not be found. His papers were then sealed up, and he, on finding that such a step was taken, said he would not remain there, and quitted the office. The pass-book was examined, and then it was discovered that the entry of the cheque for 1,400*l.* had been erased, and the cheque was never found.

There was no evidence to show that any person on behalf of the company had ever drawn the check in question, or that it had been drawn upon paper stolen from the company.

Upon this state of facts it was contended by the prisoner's counsel, that there was no evidence of any property in any of the parties from whom the check was alleged to have been stolen, except as shareholders, and that the prisoner, being also a shareholder, could not be indicted for stealing the property of which he was a joint owner. That the statute 47 Geo. 3, c. 30, whereby it was enacted — "That all actions and suits to be commenced or instituted by or on behalf of the said society or partnership, against any person or persons, or body or bodies politic or corporate, shall or lawfully may be commenced or instituted, and prosecuted in the name or names of the treasurer or treasurers for the time being of the said society or partnership, as the nominal plaintiff or plaintiffs for and on behalf of the said society or partnership, and that all prosecutions to be brought or instituted by or on behalf of the said society or partnership, for fraud upon or against, or for

embezzlement, robbery of or stealing the property of the said society or partnership, or for any other offence committed against or with intent to injure or defraud the said society or partnership, shall or lawfully may be so brought or instituted, and carried on in the name or names of the treasurer or treasurers for the time being of the said society or partnership, and in all indictments and informations, it shall be lawful to state the property of the said society or partnership to be the property of the treasurer or treasurers for the time being of the said society or partnership, and any offence committed with intent to injure or defraud the said society or partnership, shall and lawfully may, in such prosecutions, be laid to have been committed with intent to injure or defraud the said treasurer or treasurers for the time being, of the said society or partnership, and any offender or offenders may thereupon be lawfully convicted of any such offence, and the death, resignation or removal, or other act of such treasurer or treasurers, shall not abate any such action, suit, or prosecution,"—made the treasurer the representative of all the shareholders, and therefore of the prisoner as well as others, and did not alter the case.

REG. v. WATTS.

1850.

Larceny—  
Evidence.

I thought that the charge of embezzlement, and of stealing an order for the payment of money failed, but in order to obtain the opinion of this court with regard to the charge of stealing a piece of paper, I told the jury that if the cancelled cheque was returned to the prisoner, and he received it in the usual manner, to be kept by him for the use of the directors, and afterwards abstracted or destroyed it, they should find him guilty.

The jury found him guilty of stealing a piece of paper, and I have to request the opinion of this court, whether my direction was right or wrong.

The case was argued June 8.

*Cockburn* (with whom were *Bodkin* and *Bramwell*, for the prisoner.)—If this is any offence at all, it is embezzlement, and not larceny. Even assuming that the prisoner was the servant of the directors, still this piece of paper never came into their hands at all, and therefore there can be no larceny from them of what was never in their possession. The course of business appears to have been for the messenger to receive the pass-book and the old cheques from Messrs. Glyn & Co., the bankers, and deliver them to the prisoner. Supposing that to have been done in this instance, the prisoner was to keep that book and the cheques until they were required for any purpose by the company. He was therefore the person dealing with the cheque, and having a right to the possession of it. *R. v. Masters* (1 Den. Cr. Ca. 332; 18 L. J. Rep. Mag. Ca. 2), is analogous to this. There the prisoner had, as a servant, in the course of his duty, received from a fellow servant money paid to that servant for his master, by another servant, who had received it from a customer. It was the duty of the prisoner, after such receipt, to hand the money to another servant, the cashier of his master, but instead of so handing it over he fraudulently retained it, and it was held to be embezzle-

Argument for  
the prisoner.

REG. v. WATTS

1850.

Larceny—  
Evidence.Argument for  
the prisoner.

ment, and therefore not larceny. Just so here; the paper never was in the hands of the master. [COLERIDGE, J.—But surely the moment it is put into the proper place of deposit, it is in the possession of the master, just as my plate would be in my possession, if my butler were to place it in my plate chest. If he were afterwards to take it out fraudulently, and make away with it, would not that be larceny?] But the state of things is different here, there is no proof that there ever was any place of deposit, and even if there were, it is not stated in the case that the prisoner ever so deposited it. [COLERIDGE, J.—But it was clearly the prisoner's duty to hand it over to his employers.] Probably that might be so on their demanding it, but the case must be taken as it stands, and we find nothing more than the fact that the paper was received from the messenger. If the possession of the master was necessary to make this a larceny, there is nothing to show that such possession was ever had. The prisoner might, for all that appears, have put the cheque into his pocket, or into the fire the moment he received it. [ALDERSON, B.—But how does this case differ from *R v. Murray* (1 M. C. C. 276; 5 C. & P. 145.) There the prisoner, a clerk in the employment of A., received from another clerk 3*l.* of A.'s money, that he might (among other things) pay for inserting an advertisement in the *Gazette*. The prisoner paid 10*s.* for the insertion, and charged 20*s.* for the same, fraudulently keeping back the difference. The prisoner having been convicted of embezzlement—on a case reserved, the judges thought the offence not within the statute, because A. had had possession of the money by the hands of his other clerk, and they therefore held the conviction wrong.] There the money proceeded from the master to the prisoner, for the latter received it from a clerk, who handed it to him for a specific purpose; that is not so here. [PATTESON, J.—But does it not in this case proceed from the master of the prisoner? Had they lost all their right in it as soon as it was issued? May not the bankers be considered as their agents, it being their duty to return the cheque to them?] But that assumes that the cheque had been originally in the hands of the company. But there is no evidence whatever of its ever having been drawn by them, or ever having been in their possession. The cheque may have been forged. [WILDE, C. J.—How can the prisoner be allowed to say that this was a forgery, after he himself has put it forward as genuine?] At all events the bankers cannot be considered as the agents of the persons who drew the cheque, as far as the returning the cheque is concerned. The bankers are entitled to keep the cheques as soon as they have paid them. They are their property, for they are the only vouchers to them that money of a customer in their hands has been paid out to his order. It is true that as a matter of practice, old cheques are frequently returned, but that will not alter or take away the right of the bankers to keep them in any particular instance. The practice cannot be allowed to affect the question of property. [WILDE, C. J.—But surely a cheque has always been taken to

e the property of the drawer as soon as it is paid, and that he has right to have it delivered up to him.] I apprehend that a cheque stands on precisely the same footing as a bill of exchange, which the acceptor may always retain after he has paid it. It is his only evidence to discharge himself in case an action is brought against him. As a matter of custom, although it is true some bankers give up paid cheques, others uniformly refrain from doing so. The resumption in this case is, that the cheque was destroyed by the prisoner as soon as he received it, for the evidence shows that when the servant of the company went to look for it in the place where the prisoner would probably keep it, it could not be found; and if he did so destroy it without putting it into the constructive possession of his masters, he cannot be convicted of the larceny. Secondly, was the prisoner in such a situation with respect to the company, that he could be considered to be their servant in dealing with this cheque? The company consists of a number of shareholders, not incorporated, but authorized under the statute mentioned in the case, to sue and prosecute in the name of their treasurer. With regard to all other matters, the company is to have all the incidents of a common partnership. The statute, therefore, does not give a different character to the prisoner's act, and make that a larceny which would not be one under ordinary circumstances. It is true he was employed as a clerk at a salary, but he was also a shareholder, that is to say, a partner, and consequently if he is convicted upon this indictment, he will be found guilty of stealing his own goods. The fact of joint ownership must entirely override any conclusion to be drawn from that of service, or while the former exists, no trespass can be committed by the man who possesses it. The receipt of a salary makes no difference. It often happens that one partner, in consideration of his taking a larger share of labour, is entitled to receive an extra remuneration out of the joint funds, but he is not the less a partner with respect to them. Suppose this indictment to have been framed at common law, then it would have been necessary to set out the names of all the shareholders of the company, and amongst them the name of the prisoner would have appeared. In that case, on the face of the indictment, it would have been apparent that the prisoner was charged with committing a crime against himself. No doubt there are cases in which it has been decided that a man may be found guilty of stealing his own property; but that was under circumstances that unquestionably do not appear here. They applied merely to cases in which a third party had a special possession, and the prisoner, although having the right of property, had no right to possession at all. Here the prisoner has not only the right of property, but he has the right of possession also, and there is no case which goes the length of saying that under such circumstances as these, a man can be convicted of larceny: (see 2 Russell on Crimes, 87.) There are counts here calling him the servant of the directors. [CRESSWELL, J.—He is called in some the servant to the goldsmid and others.] And the "others" mean the share-

REG. v. WATTS.

1850.

Larceny—  
Evidence.Argument for  
the prisoner.

**REG. v. WATTS.** holders, of whom he himself was one. He is charged, therefore, not only with stealing from himself, but also with being servant to himself.

1850.

*Larceny—  
Evidence.*

Argument for  
the prisoner.

*Attorney-General* (Sir John Bayley and Bovill with him) for the prosecution.—This is a case of larceny and not embezzlement. The principal point made on the other side is that the cheque was in *transit* and never reached the possession of the company—for that the prisoner having had it returned to him, and having received it in the course of business for the use of the directors, if he destroyed it, it could not be in their possession, either actually or constructively. I contend that when the cheque reached the prisoner, it had arrived at its ultimate destination. The case *R. v. Murray* is an authority for this position. There the property had never come to the hands of the master. It was received from a servant by the prisoner, whose duty it was to pay it over. Suppose I send my clerk to a bookseller to get me a particular book, and he returns with it and puts it on a shelf for me, or gives it to another servant of mine. In either case it comes into my possession, and if any person, *animo furandi*, takes it from the shelf, or the servant to whom it was delivered fraudulently appropriates it, he is guilty of larceny. In *Murray's case* the master had possession of the money, not by himself, but by means of another servant, and here the company had possession of this cheque as soon as it was delivered to the messenger from whom the prisoner received it. It is quite immaterial what may be the practice at other banking houses, for the case finds that the bank here was in the habit of returning the cheques to their customers, and this sufficiently establishes that the property was in the latter. In *R. v. Masters* the money had never been received and adopted by any one as the master's money. [CRESSWELL, J.—The view taken in that case appears to be that no one of the persons who actually received the money was under any obligation to hand it over to the master. It appeared to be the duty of each to pay it to another servant. WILDE, C. J.—*R. v. Masters* does not profess to overrule *R. v. Murray*, but it distinguishes it.] I contend that as soon as the prisoner received the cheque, it became the property of his masters. At all events this would be so as soon as he had compared the entries in the pass-book with the books of the company, for all exclusive dealing with the cheque on his part would then be at an end. [CRESSWELL, J.—But it does not appear from anything in the case that this had been done.] The case finds that it was his duty to do it, and it is to be presumed, until the contrary be shown, that he had performed his duty thus far. With regard to the assertion that the cheque was the property of the bankers, that is answered also by the case, for whatever rights the bankers might have had, it is clear they relinquished them when they delivered the cheque to the messenger. They clearly intended by that that it was to be kept by the company for their own use. Then it was said that the prisoner had himself the property in the cheque, for that being a shareholder, he was in

fact a partner, and he could not, therefore, steal his own goods. But in *R. v. Hall* (1 M. C. C. 474), it was held to be embezzlement in a member (a secretary) to a society fraudulently to withhold money received from other members, to be paid over to the trustees. [COLERIDGE, J.—The clerk in that case was not a trustee, and the property was vested in the trustees.] But here the directors stand on the same footing as trustees. If a man be a member of a company, he may delegate to others the property in any article, and if he afterwards fraudulently deprive them of it, it is no answer to say that that article belongs as much to him as to them. He has got rid of his general right by granting to them a special one, just as a man who bails property to another may be guilty of larceny, if he fraudulently takes it from the possession of the bailee. It is immaterial, therefore, whether or not the prisoner had an equal right to the property with the directors, if they had the right to the custody and possession of the article. Here the directors, by the assent of all the shareholders, had a special property in the books, cheques, &c. of the company. This is part of the case in *R. v. Jenson* (1 M. C. C. 434.) A clerk to a savings bank was indicted for embezzlement, and it was held that he was properly described as a clerk to the trustees, although he was in fact elected by the managers: *R. v. Miller* (2 Moo. C. C. 249), is also in point. Then it is said that he was not a servant. But the case finds that he was a salaried clerk in the office of the company; that the directors appointed and dismissed clerks and servants, and fixed their salaries as well as defined their particular duties. If the jury have found that that was so, how can it be now contended that the prisoner was not a servant? On condition of receiving a salary, he consents to become a servant of the directors. [WILDE, C. J.—Whom would he sue for his salary?] The directors who appointed him; they entered into the contract with him, and they may be sued in case of a breach. His duties as a servant, and his rights as a shareholder, are totally distinct things. It is in the former character that he receives this cheque, and steals it, and in that character, therefore, may he be convicted.

*Cockburn*, in reply.—In *R. v. Murray* the property must clearly be taken to have been the money of the master; the case proceeds upon such an assumption. In *R. v. Masters*, on the contrary, the first person received it from a stranger, and it had never been the property or in the possession of the master. The one case was held to be larceny, the other was the ordinary one of embezzlement. *R. v. Masters* is analogous to the present case, and must, therefore, regulate the decision.

WILDE, C. J., now delivered the judgment of the court.—We have considered this case, and we are all of opinion that the counts in the indictment which charge the stealing a piece of paper, the property of Goldsmid and others, the masters of the prisoner, are supported by the evidence. By the statement of the case it appears that Goldsmid and others are the directors of the company, and

REG. v. WATTS.

1850.

Larceny—  
Evidence.

REG. v. WATTS

1850.

Larceny—  
Evidence.

Judgment.

that by its constitution they have the appointment and dismissal of the servants in the employ of the society; that they fix and pay their salaries, and also fix the duties which they are to perform. The prisoner was a salaried clerk in the office, and therefore he was their servant. They have also the ultimate charge and custody of the documents of the company, and by the course of business between the company and its bankers the paid cheques, which are part of the company's documents, are returned to the directors, and become the vouchers of the directors; as such directors they were entitled to the paper in question as one of those. One of the prisoner's appointed duties was to receive and keep for his employers such returned cheques; any such paper, in his custody, would be in the possession of his employers. The paper in question, therefore, as soon as it had passed from the hands of the messenger and arrived at its ultimate destination (the custody of the prisoner for the directors), was really in their possession, and when he afterwards abstracted it for a fraudulent purpose, he was guilty of stealing it from them, as a butler who has the keeping of his master's plate would be guilty of larceny if he should receive plate from the silversmith for his master at his master's house, and afterwards fraudulently convert it to his own use before it had in any other way than by his act of receiving it, come to the actual possession of the master. This case is distinguishable from those in which the goods have only been in the course of passing towards the master, as in *Reg. v. Masters*, where the prisoner's duty was only to receive the money from one fellow-servant and pass it on to another, who was the ultimate accountant to the master. Here the paper had reached its ultimate destination when it came to the prisoner's keeping, and that keeping being for his masters, made his possession theirs. In this view of the case no difficulty arises as to the part ownership, from the fact that the prisoner was a shareholder in the company. As such, he had no property in this paper.

Conviction affirmed.

Attorney-General, Sir John Bayley, and Bovill, for the prosecution.

Cockburn, Bodkin, and Bramwell, for the prisoner.

## COURT OF QUEEN'S BENCH.

November 23, 1850.

REG. v. KENEALEY.(a)

*Indictment removed by certiorari—Costs of prosecution—Civil officers—Guardians of the poor—What is a fact which it concerns them to prosecute as such officers—5 Will. & M. c. 11, s. 3.*

*Statute 5 Will. & M. c. 11, s. 3, is not confined to cases in which there is a legal obligation upon public officers to prosecute, but entitles them to costs if they institute a prosecution in obedience to a duty of imperfect obligation only.*

*An illegitimate child found straying in the streets, with marks of serious injury upon its person, was taken before a magistrate, who received evidence of acts of violence committed upon the child by its father, and recommended a prosecution. One of the relieving officers took the child to the workhouse, and the guardians of the union prosecuted the father for ill-treating the child; and although the father applied to them for the child, and offered to pay any expense which they had incurred, they refused to give it up to him. It turned out, upon the trial of the indictment, removed by the defendant into this court, that, in fact, the father had behaved generally with kindness to the child, though on one occasion he had punished it excessively, and the father was convicted of an assault:*

*Held, that the guardians were entitled to the costs of prosecution, under 5 Will. & M. c. 11, s. 3, they being civil officers, who, as such, were concerned to prosecute.*

A RULE had been obtained, calling upon the prosecutors of this indictment, who were the Guardians of the West London Union, to show cause why the side bar rule for their costs should not be discharged. This was an indictment for various assaults, upon a child, found at the Middlesex Sessions, and removed into this court by *certiorari*, at the instance of the defendant. The defendant was the putative father of the child; and the circumstances which led to the prosecution were these. The child was found straying and deserted in the streets by a constable, who took him before a magistrate of the City of London; there were marks of great violence upon the child's person; and the magistrate recommended a prosecution. One of the relieving officers of the West London Union being present, took the child to the workhouse, and then the guardians of that union took up the case.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.



REG.  
v.  
KENEALEY.  
—  
1850.  
—  
Indictment  
removed by  
certiorari—  
Costs.

A charge was made before a magistrate, and a prosecution instituted by the guardians. The defendant applied to them to give up the child to him, offering to pay any expense to which they had been put for his maintenance, but they refused so to do. Upon the trial before Lord Campbell, C. J., after Trinity Term, it appeared that, although on one occasion the defendant had been guilty of excess in correcting the child, his general conduct towards it was affectionate and kind. He was convicted of a common assault, and sentenced.

*Crowder* (*Huddleston* with him), now showed cause.—The guardians, it may be admitted, were not parties aggrieved, but they certainly were civil officers, “concerned to prosecute,” within sect. 3 of 5 Will. & M. c. 11;(b) if so, they are entitled to their costs. The statute is to be construed liberally: (*Reg. v. Kettleworth*, 5 T. R. 32.) [COLERIDGE, J.—In *Reg. v. Sharpness* (2 T. R. 47), it is said that it ought to be construed strictly.] At all events *R. v. The Earl of Waldegrave* (2 Q. B. 341), is precisely in point; and it overrules *R. v. Edwards* (5 B. & Ad. 407.) How can it be said that they were not concerned? They were bound to relieve the child as casual poor, but even if they were not, the question is not whether there was a legal obligation, but whether it was a fair moral duty, a duty of imperfect obligation on their part to prosecute. (He referred to 4 & 5 Will. 4, c. 76, s. 38; and 11 & 12 Vict. c. 110.)

Argument.

*Whately* and *Murphy*, Serjt., contra.—In *R. v. The Earl of Waldegrave*, there was a clear duty on the part of the police commissioners to protect their force, and therefore they were clearly concerned to prosecute an assault upon one of their officers; but here this child was not casual poor; he was not chargeable to any parish or union, for the father offered to take him and relieve the union from all liability; and the interference of the guardians stands upon the same footing as the interference of any humane person happening to learn the circumstances. [LORD CAMPBELL, C. J.—They were bound to relieve the child or deliver him to the father; and under the circumstances it could not be their duty to do that. COLERIDGE, J.—*Ex officio* concerned is different from *ex officio* bound.] It is difficult to put any other limitation upon the words. The Poor-Law Acts cast upon the guardians the duty of instituting certain prosecutions, as for offences committed in the workhouse; but there is no mention of any prosecution such as this. (He referred to 7 & 8 Vict. c. 101, s. 59.) *R. v. Edwards* (5 B. & Ad. 407), and *R. v. Dewhurst* (*ib.* 405), go much further than this case. They must be concerned as *such officers*, and the prosecution, therefore, must be within the scope of their office:

(b) That section enacts that if the defendant prosecuting such writ of *certiorari* be convicted of the offence for which he was indicted, then the said Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tythingman, churchwarden or overseer of the poor, or any other civil officer, who shall prosecute upon the account of any fact committed or done, that concerned him or them as officer or officers to prosecute or present, &c.

(*R. v. Sharpness*, 2 T. R. 47; *R. v. Taunton St. Mary*, 3 M. & S. 465.)

LORD CAMPBELL, C. J.—I am of opinion that this rule ought to be discharged. It turns upon the construction of 5 & 6 Will. & Mary, c. 11, s. 3, and I will not say that that statute is to receive either a strict or liberal construction. I will adopt the canon of construction suggested by my brother Murphy; I will look at the words of the section, and gather from them the meaning of the Legislature according to their fair and ordinary sense. The material words are “any civil officer who shall prosecute upon the account of any fact committed or done, that concerned him, as officer, to prosecute.” Now, the prosecutors in this case are the guardians of the union, and the question is whether it concerned them, as such guardians to prosecute this case. If the position with which Mr. Whately commenced his argument could be sustained, that the officers were not concerned to prosecute unless the law cast upon them the duty of instituting the prosecution, this certainly would not be a case within the enactment, because the guardians of the union could not have been indicted or punished if they had refused to prosecute. But that is not, in my opinion, the just construction of the section. Does it not concern the officers as such to prosecute, if it be a duty, though of imperfect obligation, on their part to prosecute? That was the construction adopted in *R. v. The Earl of Waldegrave*, where the court held, that although there was no legal binding obligation to prosecute, for the neglect of which the commissioners might have been punished, yet that it concerned them to prosecute in that case. Then was there in this case, though not a legal, yet a moral obligation to prosecute, for the violation of which the guardians might justly have been censured? I think there was. It certainly turned out at the trial that though the defendant had been guilty on one occasion of considerable excess in punishing the child, he had generally treated it with kindness and affection; but what was the situation of the guardians at the time when they instituted the prosecution? The child was apparently cast upon the world without a protector, and exhibited marks not only of most unmerciful flogging, but even of some attempt at strangulation. Such were the appearances on the child, and such the evidence before the magistrate. Surely, under those circumstances, it was the duty of the guardians to do all that was fit to be done for the purpose of bringing to account the person who was supposed to have been guilty of such violence. There was no one else to do it; the guardians were not mere volunteers; and if they had not taken the matter up, probably no investigation would have taken place. They were the guardians of the poor of the union in which the occurrence took place; they were *in loco parentis* to the child found deserted under such circumstances in their union; and I think it was their duty to prosecute. It was for the good of the public, and highly proper that such circumstances should be investigated; and it seems to me that it did

REG.  
v.  
KENNELLY.  
—  
1850.  
—  
Indictment  
removed by  
certiorari—  
Costs.

Judgment.

REG.  
v.  
KENNEALEY.

1850.

Indictment  
removed by  
certiorari—  
Costs.

Judgment.

concern them, as such officers, to prosecute, and that therefore they are entitled to their costs. The statute is, in my opinion, a very salutary one; and if a party insists upon bringing a case into this court, and thus rendering the proceeding much more expensive, he must, if he is convicted, pay the costs.

COLERIDGE, J.—The question is, whether the defendant was prosecuted on account of a fact done, which it concerned the guardians, as such officers, to prosecute, and I do not agree with my brother Murphy, that that expression is identical with the term *ex officio* prosecution; because, if it were, then the omission to prosecute would probably render them liable to punishment. I quite agree that the language of the statute is not to be strained; but remembering the defective state of the law then and even now as to the costs of prosecutions, I think this is a very wholesome statute, and full effect is to be given to its provisions. Now, the words are very general; they include anything which the officers are *concerned* to prosecute, and that may well mean anything in which their office gives them an interest, or which has relation to their office. Then, did not these guardians occupy a position different from that of some benevolent individual—some mere stranger who happened to see the occurrence? Did not their situation as guardians of the union and of the poor persons brought under their charge, vary their position in some degree? That cannot be questioned; and it seems to me that the amount of that variance, whatever it was, would satisfy the words of the statute. The strongest case is that of *R. v. Sharpness*; but it admits of a satisfactory explanation. That was the case of a justice who took upon him to prosecute a gaoler, who, in his opinion, had neglected his duty; and it was held that it did not concern him as a justice at all to prosecute that offence. In truth, the decision proceeded on the ground that it is foreign to the duty and character of a justice to institute prosecutions at all; the proper function of a justice being either to hear as a judge, or to stand between the party and the Crown, and not to institute prosecutions. *R. v. The Earl of Waldegrave* is, however, I think, precisely in point.

ERLE, J.—In construing this statute, we ought to look at the words which are used, and the mischief which it was intended to remedy. Now the statute recites that divers evil-disposed persons, fearing to be deservedly punished where they and their offences are well known, have obtained writs of *certiorari* to remove indictments, and the prosecutors, attending with their counsel and witnesses, have been put to great delay and expense; and then for remedy of that evil, provides that the defendant who removes an indictment by *certiorari* is to enter into a recognizance, and to become liable, if convicted, to pay the costs. If, therefore, a defendant chooses to take his case out of the ordinary tribunal appointed by law for its decision, he does so at the risk of having to pay the costs; and in the present case it seems to me that the statute has been fully satisfied. It is quite clear that the statute

goes beyond cases, in which the officer is bound *ex officio* to prosecute, and would be liable to punishment if he did not. If the officer acts in the belief that he is fulfilling a duty of imperfect obligation connected with his office, I think we ought not to look at the result of the prosecution to decide whether he is entitled to costs. If a father prosecuted in a case like this for his child, there can be no doubt that he would become a party grieved within this statute; and when a child is lost, the guardians of the poor, to whom the child is thrown—if I may use that expression to signify its helpless and desolate condition—are, I think, in the place of a parent. I know no way of defining precisely the duty which would be sufficient to bring a case within the words of this section; but I should always be disposed to give costs, unless I could say “you clearly had no concern with this prosecution; you were a mere volunteer.”

*Rule discharged.*

REG.  
v.  
KENRALEY.  
—  
1850.  
—  
*Indictment  
removed by  
certiorari—  
Costs.*

## COURT OF QUEEN'S BENCH.

November 28, 1850.

REG. v. THE INHABITANTS OF TURWESTON. (a)

*Highway—Non-repair—Indictment—Averment of immemoriality—Parish.*

*In an indictment against a parish for non-repair of a highway, an averment of the immemoriality of the highway is surplusage, and need not be proved, for the duty to repair sufficiently appears from the fact, that there is a highway in the parish out of repair. In an indictment for non-repair of a highway it was alleged, that from time whereof the memory of man runneth not to the contrary, there was and yet is, a common and ancient highway leading, &c., and that a certain part of the same Queen's common highway, situate, &c., on the 1st day of January, in the 12th year of the reign aforesaid, and continually afterwards until the taking of this inquisition, was, and yet is, in great decay, &c., so that the liege subjects, &c. could not, during the time aforesaid, nor yet can return, pass, &c.*

*Held, that though the averment of immemoriality were struck out, the indictment would show the existence of the highway, as such, at the time when the offence was alleged to have been committed.*

THIS was an indictment for the non-repair of a highway. The indictment charged, that from time whereof the memory of man runneth not to the contrary, there was, and yet is, a

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

REG.  
v.  
INHABITANTS  
OF  
TURWESTON.  
—  
1850.

Highway—  
Indictment for  
non-repair.

common and ancient Queen's highway, leading from the village of Turweston, in the county of Bucks, to the village of Evenley, in the county of Northampton, used for all the liege subjects of our Lady the Queen, and her predecessors, with their horses, coaches, carts, and carriages, to go, return, pass, ride and labour, at all times of the year, at their will and pleasure, and that a certain part of the same Queen's common highway, situate, lying, and being in the parish of Turweston aforesaid, beginning at and leading out of the Buckingham and Brackley turnpike-road, at and through a gate nearly opposite the windmill, in the parish of Turweston aforesaid, and so continuing towards the village of Evenley aforesaid, as far as the new Buckinghamshire Railway-bridge, for the length of 2,997 feet, and being of the breadth of 30 feet, on the 1st day of January, in the 12th year of the reign aforesaid, and continually afterwards until the taking of that inquisition, was and yet is in great decay for want of due reparation and amendment of the same; and that the liege subjects of the Queen passing and travelling through the same, with their horses, coaches, carts and carriages, could not during the time aforesaid, nor yet can go, return, pass, repass, ride, and labour without great danger, to the great damage and common nuisance of all the liege subjects of the Queen passing through that way, and against the peace, &c.; and that the inhabitants of the said parish of Turweston, in the said county of Bucks, the common highway aforesaid (so as aforesaid being in decay), ought to repair and amend when and so often as it shall be necessary. The defendant pleaded not guilty. At the trial, which took place at the Spring Assizes for Bucks, 1850, the case for the prosecution was, that there had been an immemorial way leading out of the turnpike-road towards the parish of Evenley, but that in the year 1814 the occupier of the land had made a new way, and had dedicated it to the public; and that that was a public highway, and out of repair. It was submitted, at the close of the prosecutor's case, that they had failed in proving the indictment. The objection was overruled by Mr. Justice Wightman, who, however, reserved leave to move to enter a verdict for the defendant. A rule *nisi* having been obtained pursuant to leave,

Argument.

*O'Malley* and *Wells* now showed cause.—The words of immemoriality in this indictment are mere surplusage. The observations of Lord Denman, C. J., and Coleridge, J., in the case of *R. v. The Marchioness of Downshire* (4 A. & E. 232), apply to cases in which the allegation of immemoriality is necessary in order to show any liability, as in the case of *R. v. The Tithing of Westmark* (2 M. & Rob. 305.) In this case, the allegation of a highway in the parish shows a duty to repair in the defendant, and the allegation of immemoriality may be struck out without vitiating the indictment: so that the rule in *Williams v. Allanson* (2 East, 452), which is confirmed by the case of *The Attorney-General v. Clark* (12 M. & W. 640), applies.

*Prendergast*, and *Keane*, contra. — The existence of a high-

way, and its immemoriality, constitute the averment. [WIGHTMAN, J.—To traverse the immemoriality averred would raise a false issue.] The prosecutor is bound by the description he has selected. It is not necessary to prove the *termini*; yet if they be alleged, they must be proved as alleged: (*R. v. St. Weonards*, 6 C. & P. 582; 1 Russell on Crimes, 334; *R. v. Marchioness of Downshire*.) The prosecutor has no right to insert an allegation which may mislead the defendants; on the issue highway or no highway, he says, this is an immemorial highway, and, if the other side be right, the defendants ought nevertheless to prepare themselves for disproving a highway by dedication under the 5 & 6 Will. 4, c. 50. Then, if the words “from the time whereof the memory of man runneth not to the contrary” be struck out of the indictment, there will not be any positive averment that the road became a public highway at any time earlier than just before the finding of the indictment; the existence of a highway must be averred with time and place, before the fact of its being out of repair can be properly averred; strike out from this indictment the averment of immemoriality, and the existence of this road as a highway at the time when it is therein alleged that the offence was committed, will not appear. The averment of immemoriality covers every part of the period of legal memory; the period indicated by the words “was and yet is,” may leave a gap during which the road was not a highway, and that may be the period to which the allegation of non-repair applies.

REG.  
v.  
INHABITANTS  
OF  
TURWESTON.  
—  
1850.

Highway—  
Indictment for  
non-repair.

COLERIDGE, J.—I think that this rule must be discharged. Immemoriality is not matter of description, nor a test of liability in this case; if it were, I agree that it ought to appear, and be proved. Judgment. The liability in this case arises the moment the road becomes a highway; no matter how. The other point has not been made out; for, though the averment of immemoriality were to be struck out, it would still appear that part of the same high road which, in the commencement, “was and yet is,” on the 1st of January, in the 12th year of the Queen, “was and yet is” out of repair. So that a date anterior to the finding of the inquisition, is averred of the existence of the road.

WIGHTMAN, J.—I am of the same opinion. The allegation of immemoriality is no part of the description of the highway; and the gist of the indictment is, that the part described is a highway, and out of repair. In *R. v. Marchioness of Downshire*, the description of the highway itself was involved: in this case the description is from point to point; the rest is surplusage. I think the allegation sufficient for the present purpose.

ERLE, J.—It is necessary to show a duty to repair. That is lone, in the case of a parish, by alleging a highway, and that it is out of repair; how it became a highway, whether its origin was under the statute of 5 & 6 Will. 4, or in any other way, is quite immaterial.

*Rule discharged.*

## COURT OF QUEEN'S BENCH.

November 21, 1850.

REG. v. BLAKEMORE. (a)

*Reference of indictment for not repairing a highway—Legality of—  
Costs—Statute 5 & 6 Will. 4, c. 50, s. 98.*

*When the subject-matter of an indictment of a public nature was referred before trial, and it was agreed that a verdict in conformity with the award should be entered on the application of either party:*

*Held, that the indictment itself was virtually referred; that the reference was illegal; and that an attachment for not paying the costs directed to be paid by the award ought not to issue.*

A RULE nisi had been obtained, calling upon the defendant to show cause why an attachment should not issue against him for nonpayment of costs, pursuant to the Master's *allocatur*. This was an indictment for not repairing a public highway, in the parish of St. Chad's, in Stafford, alleging the defendant to be liable, *ratione tenuræ*. The indictment was removed into this court by *certiorari*, and before the trial it was agreed between the prosecutor and the defendant, that the subject-matter of the indictment should be referred, with power to the arbitrator to certify to a judge at Nisi Prius, that a verdict in conformity with his award might be entered at the assizes, on the application of either party, and that no advantage should be taken by either party by reason of the record not having been entered, and the trial not having been proceeded with. The arbitrator awarded that the defendant was liable, that his defence was frivolous and vexatious, and that the prosecutor should be at liberty to enter a verdict of guilty. This was done; and the prosecutor proceeded to tax his costs, notwithstanding notice to the contrary, and an *allocatur* for 79*l.*, which included the costs of the reference and the award, was ultimately given.

*Whateley* now showed cause.—First, the reference was illegal, for the indictment related to a public grievance, and there was, in fact, a reference of the indictment, because it was agreed that a verdict should be entered in accordance with the result of the award: (*Keir v. Leman*, 6 Q. B. 321; *R. v. Bardell*, 5 A. & E. 619; *R. v. Hardy*, 19 L. J. 196, Q. B.)

(a) Reported by A. BITTLESTON, Esq., Barrister at-Law.

[Several other objections were taken, but the decision of the court renders it unnecessary to state them.]

*Bramwell*, *contra*.—This reference was lawful. It contemplated and avoided all the difficulties that arose in the case of *R. v. Hardy*. It refers to the subject-matter only of an indictment, and there was no absolute stipulation that a verdict should be entered, at least without permission of the court. All the powers of the arbitrator were to be exercised before verdict.

LORD CAMPBELL, C. J.—They were to operate on the verdict.

WIGHTMAN, J.—In *R. v. Hardy* the indictments were completely disposed of by verdicts of not guilty.

LORD CAMPBELL, C. J.—The first objection is fatal; though we yield to it with regret, for it is a most ungracious one. The reference took place in good faith, but the submission clearly includes the indictment as well as the subject-matter of it. The case of *Keir v. Leman* shows that if the subject-matter of the award cannot be enforced by action, the award cannot be enforced by attachment. Adopting this criterion, we have to inquire whether the subject-matter of the indictment could be the ground of a civil action. It is clear that it could not, for the subject-matter was the neglect to repair a public highway, which is a public grievance, to remedy which a civil action would not lie. The rule, therefore, must be discharged.

COLERIDGE, J., WIGHTMAN, J., and ERLE, J. concurred.

*Rule discharged.*

REG.  
v.  
BLAKEMORE.  
1850.  
Reference of  
indictment to  
arbitration.

## COURT OF QUEEN'S BENCH.

November 21, 1850.

REG. v. BARTON.(a)

*Criminal information against a magistrate—Misconduct in office.*

*Misconduct in his office may render a magistrate amenable to a criminal information, though he be not actuated by motives of pecuniary interest or personal malice,—as, if he gives way to passion so as clearly to interfere with the due administration of justice; but a mere display of ill-humour, or an error of judgment, such as the omission to administer an oath or to give a caution to a dying man before taking his examination, will not induce the court to interfere.*

A RULE *nisi* had been obtained, calling upon the defendant, a Lincolnshire magistrate, to show cause why a criminal information should not be filed against him for misconduct in his office.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.



REG.  
v.  
BARTON.  
—  
1850.  
—  
*Criminal  
information  
against  
magistrates.*

The affidavits disclosed the exhibition of considerable ill-feeling between the defendant and Mr. Grayburn, the magistrate's clerk, at the bed-side of one Thompson, whose evidence the magistrate had attended to take upon a charge of cutting and wounding. Thompson had been dangerously wounded by a man named Saunderson, and was on his death-bed when the defendant took his examination; but no oath was administered to him, nor any caution given that he was in a dying state; and Thompson becoming worse, the examination was never completed. Any further statement of the facts is deemed unnecessary, as the case is only valuable for the principles stated in the judgment of the court.

Sir F. Thesiger and Willmore showed cause.

M. D. Hill, *contra*.

Judgment.

LORD CAMPBELL, C. J.—I am of opinion that this rule should be discharged. No doubt my brother Patteson did well in granting it. A magistrate is properly answerable to a criminal charge for misconduct in his office, though in such misconduct he may not be actuated by any motive of pecuniary interest, and though he may not mean maliciously to injure any individual. If he gives way to passion, if in doing anything connected with the administration of justice he is guilty of any impropriety of demeanour so as to affect the due discharge of his duties, this court may direct that the case against him shall be laid before a jury. It was a feeling that something of this kind had occurred which induced my brother Patteson to grant the rule. He did not grant it merely because there had been a foolish display of feeling among these parties. He may have supposed that the affidavits offered *prima facie* proof that the defendant did give way to his bad passions in his conduct in this case, and that through his doing so, though he was not actuated by pecuniary motives, justice could not be done in the case. That being so, the object for which the rule was granted has been answered. Though I do not say that the defendant conducted himself throughout with great propriety, for I think he would have done better when he came to the house to take the examination, to say nothing about his disappointment or chagrin at being kept waiting; still we must consider that the appointment had been in fact first broken in the morning and the second time in the afternoon, and that the defendant had on the latter occasion been compelled to wait twenty-five minutes. And when we recollect these things, I think we cannot say that he behaved with very great impropriety in remonstrating upon the subject with the magistrate's clerk. The clerk, in the most unbecoming manner, said that this remonstrance all arose out of private pique. Now, therefore, though I cannot say that the defendant acted with the greatest propriety, I do not say that he gave way to passion in a manner which renders him amenable to the criminal jurisdiction of this court. Then I ask myself whether justice was defeated by this impropriety of the defendant's conduct, such as it was, and in answer I cannot say that I think it was, for the examination was conducted in the way that Grayburn suggested, and questions

were put in examination as long as the man was capable of the effort of answering them. I see no reason for supposing that this altercation between the defendant and Grayburn at all affected the examination, or that justice in any way suffered from it. I am therefore of opinion that this rule for a criminal information against the defendant must be discharged. With respect to the charge against the defendant that he had omitted to caution Thompson as to the statement he was making, and likewise that he omitted to administer an oath, these are only errors of judgment, and for errors of judgment in magistrates this court will not interfere in this way. I cannot shut my eyes to the discovery that it is not Saunderson but Grayburn who is the mover of this rule. I think that Grayburn has conducted himself with great impropriety in the manner in which this application is presented to the court, seeking for an opportunity to impute motives of animosity for the conduct of the defendant. Thus, in his affidavit, he says that he believes the defendant had not on the 20th of August had any pretence to instigate him to an attack on the deponent (Grayburn), except the gratification of an unrestrained vindictiveness and disposition to injure him, in which he believes the defendant always to have indulged. Now here is a charge against the defendant's character and general conduct, which seems to me to show that this application is not made in good faith as a means of correcting errors of magisterial conduct, but has been made with the view of gratifying a personal ill-feeling. I am therefore of opinion that the rule should be discharged with costs.

REG.  
v.  
BARTON.  
—  
1850.  
—  
*Criminal  
information  
against  
Magistrates.*

COLERIDGE, J.—It was said in the course of the argument that if a magistrate, while in execution of his office, should suffer himself to fall so under the dominion of passion as to impede public justice, the court would grant a rule for an information against him, even though *mala fides* should not be attributable to him. I do not deny that the law may be so, but I do not recollect any instance of such a case. If, however, the rule is to go for a mere yielding to human infirmity, the case should be strong in itself, and such as to leave no doubt in the mind of the court. Now the affidavit of Mr. Grayburn falls far short of either requisite, and with that I have said enough to dispose of the matter. On looking at the other affidavits, however, I say that Mr. Barton's misconduct, for some misconduct on his part I think there was, was so slight, while, on the other hand, Mr. Grayburn's misconduct and his motive in instituting this inquiry, are so much to be condemned, that this rule ought to be discharged with costs.

WIGHTMAN, J., and ERLE, J., concurred.

Sir F. Thesiger.—Then the rule will be discharged with costs, to be paid by Grayburn.

LORD CAMPBELL, C. J.—The court discharges the rule generally. If Mr. Saunderson is called on for the costs, he may adopt such steps with respect to any other party as he may be advised.

*Rule discharged with costs.*

Judgment.

## COURT OF CRIMINAL APPEAL.

November 26, 1850.

(Before LORD CAMPBELL, C. J., PARKE, B., ALDERSON, B.,  
CRESSWELL, J., and ERLE, J.)

REG. v. DAVID WILLIAMS. (a)

*Forgery—Indictment—Description of instrument—Warrant, order, and request.*

*If an indictment for forgery sets out the forged instrument in hæc verba, describing it as a warrant, order, and request for the delivery of goods, it is not necessary, in order to sustain the indictment, that the instrument should answer all the terms of that description.*

THE prisoner was convicted at the Cheshire Spring Assizes before W. N. Welsby, Esq., sitting for Williams, J., of uttering a forged warrant, order, and request, for the delivery of goods. The instrument, which was set out in some counts of the indictment, was as follows:

“ Sidney-street, 22nd December, 1849.

“ Mr. Beavan.

“ Sir,—Please to send by bearer a quantity of basket nails and clasps for  
“ E. LLOYD.”

Case.

The prisoner had been employed by Mr. Lloyd, who was a customer of Beavan's, to sell various things upon commission, and had frequently been to Beavan's shop in company with his employer. At the trial it was contended that the instrument set out in the indictment was simply a request for the delivery of goods, and therefore did not support the averment that it was a warrant, order, and request. In support of this view the case of *Reg. v. Mary Williams* (2 C. & K. 51) was cited.

Mr. WELSBY reserved the following questions for the consideration of the court. 1st. Is the instrument a warrant, order, and request. 2nd. Is it necessary that it should be all three to support the indictment.

April 27, 1850.

Argument for  
prisoner.

*M<sup>c</sup>Intyre* for the prisoner. The indictment describes the forged instrument as a warrant, order, and request. It was clearly not an order, because there was no authority to order; and, in order

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

support the indictment it ought to have been a warrant, an order, and a request. [PARKE, B.—This would be a warrant as soon as the goods were delivered. CRESSWELL, J.—If it purports to be an order, I apprehend it is not necessary that there should be authority. LORD CAMPBELL, C. J.—Suppose the words were "I order." That would not make the instrument an order unless the relation between the parties was such as to entitle one to order the other: (*R. v. Newton*, 2 Mood. C. C. 59.) A cheque would answer all the three terms of description. In *Reg. v. Crowther* (5 Car. & P. 316); and in *Reg. v. Gilchrist* (Car. & M. 224, 232) the instruments were held to be both warrants and orders, and so answered the description given of them in the indictment; but if the instrument answers one term of description only, there is a fatal variance between the averment and the proof, according to the case of *Reg. v. Williams* (2 Car. & Kir. 51.) (b) [PARKE, B.—If the indictment had alleged a forgery of one order, one warrant, and one request, that would have done, subject to the discretionary power of the judge, to call upon the prosecutor to elect; but here you say it is all matter of description. ERLE, J.—But the instrument was set out in some of the counts. LORD CAMPBELL, C. J.—Then in those counts the charge is of forging the very instrument set out.] In that view of the case the objection would be in arrest of judgment, because it alleges that the defendant forged a certain warrant, order, and request, in the words and figures following; and then the instrument set out is not a warrant, order, and request. [PARKE, B.—You say that the indictment alleges that the instrument set out in terms is a warrant, order, and request, and that upon the face of it it appears not to be a warrant, order, and request.]

LORD CAMPBELL, C. J.—We will look at the indictment.  
No counsel appeared on the part of the prosecution.

*Cur. adv. vult.*

November 26, 1850.

LORD CAMPBELL, C. J.—We conjectured that an inspection of the indictment would remove all doubt in this case, and so it has turned out. It appears that the instrument is in several counts set out in *hæc verba*, and therefore there is no doubt that the conviction is good.

ALDERSON, B.—That which was set out as the forged instrument was clearly proved.

*Conviction affirmed.*

(b) In *Reg. v. Charretie* (3 Cox C. C. 503), *Davison amicus curiæ*, mentioned that Cresswell, J., in a subsequent case, had declined to act upon the authority of *Reg. v. Williams*.

REG.  
v.  
DAVID  
WILLIAMS.  
—  
1850.

Forgery—  
Description of  
instrument.

Argument for  
prisoner.

## COURT OF CRIMINAL APPEAL.

*November 20 and 26, 1850.*(Before POLLOCK, C. B., WIGHTMAN, J., WILLIAMS, J.,  
TALFOURD, J., and MARTIN, B.)

REG. v. GEORGE DADSON.(a)

*Shooting—Justification—Apprehension of offender—Felony or misdemeanor.**A., a constable, was set to watch a copse, from which wood had been stolen. He saw B. coming from the copse carrying wood, which he had stolen, and having no other means of apprehending him, shot at and wounded him. B. had been previously convicted several times of stealing wood, so that he was in fact committing a felony when wounded; but A. had no knowledge of those previous convictions.**Held, that A. was guilty of shooting at B. with intent to do him grievous bodily harm.*

THE prisoner was tried and convicted before Erle, J., at the last Maidstone Assizes, but the learned judge entertaining some doubt as to the propriety of the conviction, reserved the following case:—

Case.

George Dadson was indicted for shooting at William Waters, with intent to do him grievous bodily harm. It appeared that he, being a constable, was employed to guard a copse, from which wood had been stolen, and for this purpose carried a loaded gun. From this copse he saw the prosecutor come out, carrying wood, which he was stealing, and called to him to stop. The prosecutor ran away, and the prisoner, having no other means of bringing him to justice, fired, and wounded him in the leg. These were the facts on which the prisoner acted. It was alleged in addition that Waters was actually committing a felony, he having been before convicted repeatedly of stealing wood, but these convictions were unknown to the prisoner, nor was there any reason for supposing that he knew the difference between the rules of law relating to felony and those relating to less offences. I told the jury that shooting with intent to wound amounted to the felony charged, unless from other facts there was a justification; and that neither the belief of the prisoner that it was his duty to fire if he could not otherwise apprehend the prosecutor, nor the alleged felony, it being unknown to him, constituted such justification. Upon this

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

the prisoner was convicted of felony, and let out on his recognizances to come up for judgment, if required. I have to request the opinion of the judges whether this conviction was right.

[This case stood for argument on Wednesday, November 20, but no counsel were instructed. For the legal distinction adverted in the case with regard to the apprehension of felons and misdemeanants only, see 1 Hale, 481; 4 Bl. Com. 179; Fost. 271; *R. v. Smith* (1 Russ. on Cr. 546.)]

REG.  
v.  
GEORGE  
DADSON.  
—  
1850.

*Shooting—  
Apprehension  
of offender.*

*Cur. adv. vult.*

JUDGMENT.—*November 26.*

POLLOCK, C. B., delivered the judgment of the court. (After stating the facts as above)—We are all of opinion that the conviction is right. The prosecutor not having committed a felony known to the prisoner at the time when he fired, the latter was not justified in firing at the prosecutor; and having no justifiable cause, he was guilty of shooting at the prosecutor with intent to do him grievous bodily harm, and the conviction is right.

*Conviction affirmed.*

## CENTRAL CRIMINAL COURT AND COURT OF CRIMINAL APPEAL.

REG. v. FADERMAN AND TWO OTHERS.(a)

*April 27, and May 8, 1850.*

*§ 12 Vict. c. 78—Court of Criminal Appeal—Jurisdiction of court—Questions raised by demurrer—Forgery—1 Will. 4, c. 66, s. 19—Indictment—2 & 3 Will. 4, c. 123, s. 3—Demurrer—Judgment.*

*The Court of Criminal Appeal, under 11 & 12 Vict. c. 78, has no jurisdiction to decide questions raised by demurrer.*

*Where one of several prisoners included in an indictment upon being arraigned has demurred to the indictment, the court will not allow the demurrer to be argued until the rest of the prisoners have pleaded or demurred.*

*Upon an indictment under the 1 Will. 4, c. 66, s. 19, for engraving on a plate several parts of a foreign promissory note, it is not necessary that the promissory note itself, of which they are alleged to be parts, should be set out.*

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

REG.  
v.  
FADERMAN  
AND OTHERS.

1850.

Jurisdiction—  
Demurrer—  
Forgery.

*The 2 & 3 Will. 4, c. 123, s. 3, does not apply to engraving; and counts, therefore, for forgery, which described certain parts of an engraved plate as they would be described in simple larceny, were held bad.*

*A general demurrer to an indictment confesses the subject matter of it, and judgment against a defendant on such a demurrer is final.*

THE prisoners were arraigned before Mr. Justice Williams at the February session of the Central Criminal Court upon the following indictment:—

Indictment.

Central Criminal Court, }  
to wit. } The jurors for our Lady the Queen,  
and at the time of the committing of the felony and offence hereinafter next mentioned, and from thence hitherto divers foreign undertakings for payment of money of a certain foreign state, that is to say, of the Empire of Russia, were made, issued, negotiated, and circulated in the said empire, and the said undertakings for payment of money were, and each of them respectively was, during all the time aforesaid, made, issued, negotiated, and circulated for the payment of a certain amount of foreign money, that is to say, for the payment of ten pieces of foreign coin called roubles, the said pieces of coin during all the time aforesaid being lawfully current in the empire aforesaid, and during all the time aforesaid being of great value, to wit, of the value in English money of one pound ten shillings and tenpence. And the jurors aforesaid, upon their oath aforesaid, do further present, that Sodaick Faderman, late of the parish of Saint Botolph-without-Aldgate, in the city of London, labourer, otherwise called Zadok Federman, Saul Laurio, late of the same place, labourer, otherwise called Saul Aronsohn and Bernard Gordon, late of the same place, labourer, well knowing the premises, and whilst the said undertakings were current in the said Empire as aforesaid, to wit, on the 7th day of August, in the year of our Lord 1849, with force and arms, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, wilfully, knowingly, feloniously, and without the authority of the said state did engrave and make upon four several plates four several parts of an undertaking for payment of money purporting respectively to be parts of one of the foreign undertakings for payment of foreign money of the said foreign state, to wit, the said Empire of Russia, so made, issued, negotiated, and circulated in the said empire as aforesaid, and one of which said four several parts of an undertaking for payment of foreign money, so engraven and made upon a plate as aforesaid, is as follows, that is to say—

*[Here was engraved a fac-simile of a portion of the plate.]*

and one other of which said four several parts of an undertaking for payment of foreign money so engraven and made upon one other plate as aforesaid, is as follows, that is to say—

*[Engraving of another portion of the plate, consisting of a scroll and wreath, with words within the border.]*

and which said last-mentioned part of an undertaking for payment

foreign money so engraven and made as aforesaid, when translated into the English language is as follows, that is to say—

Ten Roubles Silver.

Ten Roubles Silver.

Ten Roubles Silver.

REG.  
v.  
FADERMAN  
AND OTHERS.  
1850.  
Jurisdiction—  
Demurrer—  
Forgery.

one other of which said several parts of an undertaking for payment of foreign money so engraven and made upon one other as aforesaid, is as follows, that is to say—

*A fac-simile of the undertaking itself in the Russian language]*

which said last-mentioned part of an undertaking for payment of foreign money so engraven and made as aforesaid, when translated into the English language is as follows, that is to say—

10

10

1847.

of the year.

Indictment.

### Imperial Credit Note.

On presentation of this note, immediately is given out of the Exchange Cashes of the Office of Credit Notes, Ten Roubles in Silver or Gold Coin.

Managing Director ..... KHALTSHINSKY.  
Director ..... SAN LAURENT.  
Cashier ..... KELN.

No.

X.

No.

one other of which said several parts of an undertaking for payment of foreign money so engraven and made upon one other as aforesaid, is as follows, that is to say—[*Engraving of her portion of the note*] and which said last mentioned part an undertaking for payment of foreign money so engraven and e as aforesaid, when translated into the English language is follows, that is to say—

### EXTRACT OF THE SUPREME MANIFEST CONCERNING CREDIT NOTES.

1. The imperial credit notes are secured by the total property of the empire, and by the instantaneous exchange at all times for silver coin out of the pre-established funds.



REG.  
v.  
FADERMAN  
AND OTHERS  
—  
1850.  
—  
*Jurisdiction—*  
*Demurrer—*  
*Forgery.*

"1. The imperial credit notes . . . by the total property of the empire, and by the instantaneous exchange at all times for sounding coin out of the pre-established funds.

"1. The imperial credit notes . . . by the total property of the empire, and by the instantaneous exchange at all times for sounding coin out of the pre-established funds.

"2. To credit notes currency is given throughout the whole empire the same as to silver coin.

"2. To credit notes currency is given throughout the whole empire the same as to silver coin.

"2. To credit notes currency is given throughout the whole empire the same as to silver coin.

"3. The exchange of credit notes for sounding coin is effected at the exchange cashes established in both capitals.

"3. The exchange of credit notes for sounding coin is effected at the exchange cashes established in both capitals.

"3. The exchange of credit notes for sounding coin is effected at the exchange cashes established in both capitals.

"4. For facilitating the exchange of credit notes for small sums in the government districts, the district exchequers are bound to effect the same to every presenter to the sum of 100 roubles into one hand.

"4. For facilitating the exchange of credit notes for small sums in the government districts, the district exchequers are bound to effect the same to every presenter to the sum of 100 roubles into one hand.

Indictment.

"4. For facilitating the exchange of credit notes for small sums in the government districts, the district exchequers are bound to effect the same to every presenter to the sum of 100 roubles into one hand.

"5. The taking across the frontier and the bringing from thence of credit notes is prohibited by the existing customs regulations.

"5. The taking across the frontier and the bringing from thence of credit notes is prohibited by the existing customs regulations.

"5. The taking across the frontier and the bringing from thence of credit notes is prohibited by the existing customs regulations.

"6. The forgery of credit notes subjects the guilty to the punishment provided by the laws.

"6. The forgery of credit notes subjects the guilty to the punishment provided by the laws.

"6 The forgery of credit notes subjects the guilty to the punishment provided by the laws, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen her crown and dignity."

*Second Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that before and at the time of the committing of the felony and offence hereinafter next mentioned, and from thence hitherto, divers foreign undertakings for payment of money of one Theodore Khaltshinsky and one San Laurent, known by the name and description of Director San Laurent, and

one — Keln, known by the name and description of Cashier Keln, had been and were made, issued, negotiated, and circulated in a certain foreign state, that is to say, the Empire of Russia. And the jurors aforesaid, upon their oath aforesaid, do further present that the said last-mentioned undertakings for payment of money were and each of them respectively was made, issued, negotiated, and circulated by the said Theodore Khaltshinsky, the said San Laurent, and the said — Keln, as officers in the service of the said foreign state, for the payment of a certain amount of foreign money, that is to say, for the payment of ten pieces of foreign coin called roubles, the said pieces of coin during all the time aforesaid being lawfully current in the foreign country aforesaid, and the said pieces of foreign coin during all the time aforesaid being of great value, to wit, of the value in English money of one pound ten shillings and tenpence, and the jurors aforesaid, upon their oath aforesaid, do further present that the said Sodaick Faderman, otherwise called Zadock Federman, the said Saul Laurio, otherwise called Saul Aronsohn, and the said Bernard Gordon, well knowing the premises aforesaid, afterwards, and whilst the said undertakings were so current as aforesaid, to wit, on the day and year aforesaid, with force and arms at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, wilfully, knowingly, and feloniously, and without the authority of the said Theodore Khaltshinsky, the said San Laurent, and the said — Keln, or either of them, did engrave and make upon four several other plates four several other parts of an undertaking for payment of money, purporting respectively to be parts of one of the said undertakings for payment of foreign money of the said Theodore Khaltshinsky, the said San Laurent, and the said — Keln, so made, issued, negotiated, and circulated in the said empire by the said Theodore Khaltshinsky, the said San Laurent, and the said — Keln, as aforesaid, and one of which said several last-mentioned parts of an undertaking for payment of money so engraven and made upon one of the said last-mentioned plates as last aforesaid is as follows, that is to say [*same as engraving in 1st count*], and one other of which said four several last-mentioned parts of an undertaking for payment of foreign money so engraven and made upon one other plate as aforesaid is as follows, that is to say [*as in 1st count*], and which said last-mentioned part of an undertaking for payment of foreign money so engraven and made as aforesaid, when translated into the English language, is as follows, that is to say [*translation as in 1st count*], and one other of which said several last-mentioned parts of an undertaking for payment of foreign money so engraven and made upon one other plate as aforesaid is as follows, that is to say [*as in 1st count*], and which said last-mentioned part of an undertaking for payment of foreign money so engraven and made as aforesaid, when translated into the English language, is as follows, that is to say [*translation as in 1st count*], and one other of which said several last-mentioned parts of an undertaking for pay-

REG.  
v.  
FADERMAN  
AND OTHERS.  
1850.  
Jurisdiction—  
Demurrer—  
Forgery.

Indictment.

REG.  
v.  
FADERMAN  
AND OTHERS.  
—  
1850.  
—  
Jurisdiction—  
Demurrer—  
Forgery.

ment of foreign money so engraven and made upon one other plate as aforesaid is as follows, that is to say [*as in 1st count*], and which said last-mentioned part of an undertaking for payment of foreign money so engraven and made as aforesaid, when translated into the English language, is as follows, that is to say [*translation as in 1st count*], against the form of the statute in such case made and provided, and against the peace of our Lady the Queen her crown and dignity.

*Third Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that before and at the time of the committing the felony and offence hereinafter next mentioned, and from thence hitherto, divers other foreign undertakings for payment of money of a certain foreign prince, that is to say, Nicolas, during all the time aforesaid Emperor of a certain foreign country called Russia, were made, issued, negotiated, and circulated in the said foreign country by the said foreign prince, and that the said last-mentioned undertakings for payment of money were and each of them was made, issued, negotiated, and circulated by the said foreign prince, to wit, the said Nicolas as aforesaid, for payment of a certain amount of foreign money, to wit, for the payment of ten pieces of foreign coin called roubles, the said pieces of coin during all the time aforesaid being lawfully current in the said foreign country as aforesaid, and during all the time aforesaid being of great value, to wit, of the value in English money of one pound ten shillings and tenpence. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Sodaick Faderman, &c., the said Saul Laurio, &c., and the said Bernard Gordon, well knowing the premises last aforesaid, afterwards, and whilst the said last-mentioned undertakings were current in the said foreign country, to wit, on the day and year aforesaid, with force and arms at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, wilfully, knowingly, and feloniously, and without the authority of the said Nicolas, did engrave and make upon four several other plates four several other parts of an undertaking for payment of money, purporting respectively to be parts of one of the undertakings for the payment of money of the said foreign prince, that is to say, the said Nicolas, so made, issued, negotiated, and circulated in the said foreign country by the said Nicolas as last aforesaid, and one of which said several last-mentioned parts of an undertaking for payment of foreign money so engraven and made upon one of the said last-mentioned plates as last aforesaid is as follows, that is to say [*this count concludes as the first count*].

The 4th, 5th, and 6th counts were the same as the first three, except that the instrument was described as a promissory note instead of an undertaking.

The next six counts, from the 7th to the 12th, were the same as the first six, except that they omitted the inducement altogether.

The counts from the 13th to the 24th were the same as the first twelve, except that the translation of the parts of the

Indictment.

undertaking or promissory note set out varied from the former translation.

*Twenty-fifth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said S. F., otherwise called Z. F., the said S. L., otherwise called S. A., and the said B. G., afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the city aforesaid, and within the jurisdiction aforesaid, feloniously, and without the authority of a certain foreign state, that is to say, of the Empire of Russia, did engrave and make upon four several other plates, four several other parts of an undertaking for the payment of money, purporting respectively to be parts of an undertaking of the said foreign state, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Twenty-sixth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said S. F., otherwise called Z. F., the said S. L., otherwise called S. A., and the said B. G., afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, feloniously and without the authority of T. K., S. L., and K., then and there being officers in the service of the said foreign state, that is to say, the Empire of Russia, or of either of them, did engrave and make upon four several other plates, four several other parts of an undertaking for payment of money, purporting to be parts of an undertaking of the said T. K., the said S. L., and the said K., so being such officers as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Twenty-seventh Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said S. F., otherwise called Z. F., the said S. L., otherwise called S. A., and the said B. G., afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, feloniously and without the authority of a certain foreign Prince, that is to say, the said Nicholas, then being Emperor of a certain foreign state called Russia, did engrave and make upon four several other plates, four several other parts of an undertaking for the payment of money, purporting respectively to be parts of an undertaking of the said foreign Prince, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

*Twenty-eighth to thirtieth Counts.*—The same as the three last, except that the instrument was alleged to be a promissory note instead of an undertaking.

The case came on at the February Session of the Central Criminal Court, before Mr. Justice Williams, when the prisoners demurred to the indictment, and after the subject had been discussed at great length, the learned judge suggested, that as the points

REG.  
v.  
FADERMAN  
AND OTHERS.  
1850.  
Jurisdiction—  
Demurrer—  
Forgery.

Indictment.

REG.  
v.  
FADERMAN  
AND OTHERS.  
—  
1850.  
—  
*Jurisdiction—  
Demurrer—  
Forgery.*

involved were of great importance and also of considerable difficulty, it would be more satisfactory if the opinion of the judges of the Court of Criminal Appeal could be taken, although there was a doubt as to whether a question raised upon demurrer was within the scope of their authority. It was then arranged that the matter should be submitted to them, and the following case was sent for their consideration.

## CASE.

This case came on to be tried before me at the Central Criminal Court, on the 8th February, 1850. The prisoners were indicted under the statute 1 Will. 4, c. 66, s. 19, by which it is made a felony to engrave, &c., (without authority), on any plate, or on any wood, stone, or other material, any bill of exchange, promissory note, undertaking, or order for the payment of money, or any part of any bill of exchange, &c., of any foreign prince or state; or knowingly to have in possession any plate, &c., so engraved, or to utter or knowingly have in possession any paper upon which any part of such foreign bill, &c., shall be made or printed.

The counsel for the prisoners demurred to the indictment, and the demurrer having been argued, I gave judgment for the Crown, but I reserved the question as to the validity of the indictment (a copy of which will accompany this statement), for the consideration of this court.

A copy of the indictment was added.

## COURT OF CRIMINAL APPEAL.

*May 8th.*

(Before LORD CAMPBELL, C. J., PARKE, B., ALDERSON, B., CRESSWELL, J., and ERLE, J.)

ON the case being called on

LORD CAMPBELL, C. J., said—We have referred to the act, and are all of opinion that we have no power to review a judgment given upon demurrer. The prisoners are entitled to their writ of error, which they might be deprived of if we were to assume a jurisdiction which the statute does not give us.

*Huddleston* (for the prisoner Faderman).—On the trial of *Re Harris*, subsequently reported in 19 L. J., M. C. 11, I was refused permission to withdraw a plea of not guilty, that I might demur to the indictment, but the question of law was reserved to me. It came before this court, and it was suggested that the court could not entertain the case as it then stood, but no decision was come to, and Baron Platt afterwards altered it so that it might come on as a matter in arrest of judgment.

PARKE, B.—No doubt that is within the words of the statute,

gment on demurrer is not. In this case you probably think section might not be sustainable in arrest of judgment and e you may argue that we are bound to hear the matter d upon demurrer.

*Weston*.—I called the learned judge's attention to this diffi- the trial, and he said he would take care that, if he gave it for the Crown, no prejudice should arise to the prisoners. so merely for the purpose of getting a decision of this on the question.

CAMPBELL.—If no judgment was given for the Crown, we entertain the question at all?

JE, B.—We can only take the case as it stands, and the judge says expressly that he did give judgment for the

ERSON, B.—You seem to intimate that the learned judge nerely to ask our advice as to how he should act under the tances, but we have no authority, sitting here as a court, to vice.

CAMPBELL.—Whether judgment has been given or not, not appear to us that we have power to interfere. If it has ven, then the prisoners' course is to bring a writ of error he indictment be wrong. If it has not been given, then no judgment before us for our consideration. But as as we are bound to do from the case, that judgment has been eed, it is open for you to argue that we have jurisdiction to that judgment.

ERSON, B.—But it is a grave question for you to consider : it is worth your while to satisfy us upon this point, and take away from the prisoners their right to bring a writ : . Because, whatever judgment we pronounce here is a e.

y (for another of the prisoners).—The argument was oted in the court below before it was half completed, and if oe taken that judgment was given absolutely, great injustice done, because it may turn out that judgment upon demurrer

But for the arrangement that was made, I should probably ked permission to withdraw the demurrer.

CAMPBELL. — Was not some such course as has been ere pursued in *Manning's case*? (4 Cox Crim. Cas. 31.)

*Attorney-General*, (with whom were *Clarkson* and *Ballantine*), prosecution.—In that case there was no demurrer, the prisoner claimed a right to be tried by a jury *de medietate* and the question (which was a mere collateral one), was d, as to whether she was entitled to it.

*Weston*.—Then as to the power of the court to review a nt upon demurrer. The 11 & 12 Vict. c. 78, s. 1, enacts, en any person shall have been convicted of any treason, or misdemeanor, before any court, &c., the judge his discretion reserve any question of law which ave arisen on the trial for the consideration of the

REG.  
v.  
FADERMAN  
AND OTHERS.

1850.

Jurisdiction—  
Demurrer—  
Forgery.

Jurisdiction of  
the court.

REG.  
v.  
FADERMAN  
AND OTHERS.

1850.

Jurisdiction—  
Demurrer—  
Forgery.

judges. Any question, therefore, may be reserved which arises upon the trial. What then is the meaning of a trial? I submit that the moment a prisoner is called upon to plead, the trial has commenced, and it continues until final judgment is given.

ALDERSON, B.—The first proceeding is the arraignment, then comes the trial, which is by the jury.

PARKE, B.—Surely the trial commences upon issue being joined. The words addressed to the prisoner before the jury are sworn show this.

Huddleston.—The recognizance is that the prisoner shall take his trial, and the bail are discharged upon his surrender.

PARKE, B.—No; it is that he shall surrender and take his trial.

CRESSWELL, J.—Can a man be said to be tried who pleads guilty?

Huddleston.—If he is convicted on his own confession, the proceedings in court are a trial of whether the prisoner is guilty or not. A trial need not be by a jury; there are many species of investigations to which the term trial is applied, as trial by battle, trial by view, &c., where a jury is not resorted to. In Arch. Cr. Pr. 111, 11th ed., it is said, "Under this statute (the 11 & 12 Vict. c. 78), the judge has authority to reserve, and the court to entertain, not only questions of law which are raised by the evidence, but also any question that arises upon the record, and is made the subject of a motion in arrest of judgment (*R. v. Martin*, 2 C. & K. 950), or, as it would seem, of a demurrer."

Jurisdiction of  
the court.

ALDERSON, B.—In *R. v. Martin* the point was taken in arrest of judgment.

Huddleston.—But in that case, as reported in 18 L. J. 137, M. C., B. Rolfe says, "I state it as my opinion that questions arising upon a trial may be taken to mean anything that arises in the course of the proceedings, in the particular case, in the court below, and I come to this conclusion principally because I find that, in the 2nd section of the 11 & 12 Vict. c. 78, power is given to this court to amend or arrest the judgment, which can only be when the judgment appears to be erroneous on the face of the proceedings." The 2nd section of the above statute enacts, that "the judge or commissioner, &c., shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and the said justices, &c., shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment on the trial, or to avoid such judgment, or order an entry to be made on the record that the party ought not to have been convicted, or to arrest the judgment, &c., or to make such other order as justice may require." These appear to be as extensive powers as can well be given.

LORD CAMPBELL.—But is not a conviction to be in all cases a condition precedent to this court having jurisdiction?

*Huddleston*.—But the question is, is not this a conviction? In felony it is still doubtful whether judgment on demurrer is not a final one, and, if it is, the judgment operates as a conviction. A jury is no more necessary to a conviction than it is to a trial. On pleading guilty, a prisoner is told he has been convicted on his own confession. It is said, that for this court to exercise jurisdiction in such a case as this, would be depriving a prisoner of his writ of error; but there is nothing in the act which specifically leads to such a conclusion.

REG.  
v.  
FADDERMAN  
AND OTHERS.  
—  
1850.  
—  
Jurisdiction—  
Demurrer—  
Forgery.

LORD CAMPBELL.—This act was very carefully drawn, with the assistance of my brothers Parke and Alderson, and certainly our judgment is final in all matters which we have authority to decide. Cases of conviction by verdict seem all that the Legislature contemplated.

*Parry*.—This act was passed for the purpose of substituting for the old tribunal of the fifteen judges one which should have all its powers and a great deal more, and the object the court was intended to have in view was, to advise the judges upon points of criminal law upon which its advice might be asked. The preamble of the act recites, "that it is expedient to provide a better mode than that now in use of deciding any difficult question of law which may arise in any criminal trials."

PARKE, B.—There were great complaints made that prisoners, in many cases, stood as pardoned felons who ought never to have been convicted at all.

*Parry*.—If a conviction is necessary to give this court jurisdiction, then the other side is now prepared to contend that this is a conviction, for that the judgment on demurrer is final. Jurisdiction of the court.

PARKE, B.—But we are not prepared at present to say whether it is final or not.

*Parry*.—The object of the Legislature appears to have been to give this court jurisdiction and authority over every question of law that may arise on the trial of an indictment, otherwise, what is the use of the words empowering the judges to make any such order as they shall be advised, and justice may require?

PARKE, B.—To enable them to postpone the judgment, or to permit the prisoner to go out on bail.

*Parry*.—Taking, then, this strict view of the meaning of the act, the court would have no jurisdiction in cases of pleas to the jurisdiction, or in abatement.

LORD CAMPBELL.—Whatever consequences may follow from the limitation of our authority, we clearly have no powers but what the act gives us.

*Metcalf* (for the third prisoner) quoted *R. v. Toshack* (4 Cox Crim. Cas. 38.) There the prisoner pleaded guilty upon being arraigned; but Mr. Justice Patteson, entertaining doubts whether the indictment could be sustained, reserved the question for this court.

The *Attorney-General* was not called upon.

LORD CAMPBELL.—This is, no doubt, a question of very great importance; but I entertain the opinion I before expressed, that



REG.  
v.  
FADERMAN  
AND OTHERS.

1850.

*Jurisdiction—  
Demurrer—  
Forgery.*

this court has no jurisdiction in the case. Here there is an indictment for felony, a demurrer to that indictment, and judgment given for the crown; and we are called upon to inquire into the propriety of that judgment, and if we think it wrong to reverse it. We have clearly no power to do so unless it is given to us by this act of Parliament. The power which formerly belonged to the fifteen judges was a very limited one. They were merely called upon to give an opinion upon a case submitted to them, and if they thought the conviction was erroneous, they recommended that a pardon should be granted by the Crown; but now, a power is given to review or to reverse what has been done below under certain circumstances, and we must see whether such a power as is now contended for is vested in this court. I think there is no such power. The act of Parliament is confined to questions of law which shall have arisen on the trial of persons who have been convicted of treason, felony, or misdemeanor. Looking to the language employed, it seems to all of us that the word "convicted" means convicted on a verdict, and that trial means trial by jury. There is an express power given to arrest the judgment after there has been a conviction, but no power given to consider or review what has been done upon demurrer. And very important it would be for us not to exercise such an authority unless we clearly possessed it, because we might be depriving prisoners of a right to which they were entitled, of bringing a writ of error. It is clear that any judgment we may pronounce would be final. It may be that these prisoners wish to have our decision; but others may hereafter wish that a different course should be pursued, and might be disposed to have the opinion of the House of Lords. I think, then, that we must decline the jurisdiction sought to be given to us, and that we must allow the judgment to stand. We give no opinion upon the case; we simply decline to interfere, and we leave the parties in the same position in which they were before the case was submitted to us.

*Case dismissed.*

The *Attorney-General, Clarkson, and Ballantine*, for the prosecution.

*Huddleston, Parry, and Metcalf*, for the defence.

## CENTRAL CRIMINAL COURT.

MAY SESSION.

(Before ALDERSON, B., CRESSWELL, J., and WILLIAMS, J.)

*May 8th.*

IN consequence of the refusal of the judges of the Court of Criminal Appeal to entertain the above questions, the case came on again at the above session, when the demurrer was again handed into the court and was fully argued, but before argument,

ALDERSON, B., said, I wish it to be distinctly understood that the prisoners must take the consequence of demurring, and if we decide against them and it should turn out that in point of law the judgment on demurrer is final, we shall proceed to pass sentence at once. The reason why I say so is this, that if prisoners plead not guilty, they may take advantage afterwards of any substantial legal objection in arrest of judgment. By demurrer they choose to avail themselves of mere technical defects, and if they take their stand upon such ground, they must incur all the risk of failure.

The *Attorney-General*.—I shall certainly press your Lordships for a strict legal judgment.

*Huddleston*.—We take the course we have done, my Lord, after full deliberation, and must abide by the result.

*Parry*.—I apprehend, my Lord, that the prisoner for whom I appear is not bound to plead or demur at present. One of the prisoners has demurred, and that demurrer may be argued.

CRESSWELL, J.—The prisoners must all plead or demur before we proceed to the argument.

Demurrers on the part of all the prisoners were then handed in.

*Huddleston*.—I will first state the nature of the different counts in the indictment, which is under the 11 Geo. 4 & 1 Will 4, c. 66, s. 19:—

The 1st count contains a charge of engraving parts of an undertaking for the payment of money purporting to be parts of an undertaking for the payment of money of a foreign state, to wit, the Empire of Russia, and *fac similes* of the parts are set out.

The 2nd charges the same offence, but the undertaking is said to be an undertaking of persons who are alleged to be officers of a foreign state.

The 3rd charges it as an undertaking of a foreign Prince, to wit, of the Emperor of Russia.

The 4th, 5th, and 6th counts call it a promissory note instead of an undertaking, but with no other variation.

The 7th to the 12th are the same as the first six, except that the inducement is omitted.

The 13th to the 24th are the same as the first twelve, except that there is a different translation of the parts of the instrument set out.

The 25th to the 30th describe the instrument as it would be described in a case of larceny. The first three of those counts calling it an undertaking, and the last three a promissory note.

The statute under which the last six counts are drawn is the 2 & 3 Will. 4, c. 123, s. 3, the words are, "that to prevent justice from being defeated by clerical or verbal inaccuracies in all informations or indictments for forging, or in any manner uttering any instrument," &c., and therefore I shall contend that engraving upon a plate is not such an offence as will come within that statute. Before that act it would have been necessary to set out the instrument on the face of the indictment (*Mason's case*, 2 East

REG.  
v.  
FADERMAN  
AND OTHERS.  
—  
1850.  
—  
Jurisdiction—  
Demurrer—  
Forgery.

Argument on  
the demurrers.

REG.  
v.  
FADERMAN  
AND OTHERS.

1850.

Jurisdiction—  
Demurrer—  
Forgery.

Argument on  
the demurrer.

Pleas of the Crown, 975), and to render it unnecessary now, the case must be brought clearly within the act of Parliament. In *R. v. Harris* (7 C. & P. 429), the point was raised whether under the word "forging" in that act engraving was included, and it was held that, although the objection would have been good upon demurrer, the defect was aided by verdict. In *R. v. Balls* (7 C. & P. 427), Littledale, J., intimated, that he thought the act only applied to English notes and bills, but he reserved the point. Again, the undertakings are called "undertakings for the payment of money," but it is not stated what the money was, whether it was foreign or English money, nor does it specify its amount. In *R. v. Harris* (7 C. & P. 430 b), this point was also taken, and it seems to have been held by a majority of the judges that such a description was imperfect. But there is one general objection concerning all the counts in the indictment, and that is, that the undertaking of which the portions engraved are alleged to be part is not set out in any part of the indictment, nor is there any translation of such undertaking. The word "purport" implies that there was a real instrument, and the court must be enabled to see on the face of the record that what is set out does purport to be a part of a genuine instrument: but how is that to be seen unless the genuine instrument is set forth? It may not in truth be an undertaking at all, it may be a bond or a receipt. How could a Court of Error tell from this indictment that what was alleged to be an undertaking was really one? and unless it is so no crime has been committed. In *Lloyd's case* (2 East P. C. 1122), which was a charge of sending a threatening letter, it was held that the letter ought to have been set out in order that the court might see whether it fell within the purview of the statutes. In *Lyon's case* (2 Leach, 597), it was held, that an instrument set out was not a receipt; but here the court has no opportunity whatever of seeing whether what is alleged as an undertaking is one in construction of law. In *R. v. Goldstein* (Russ. & Ry. 473), judgment was arrested on an indictment which charged the forgery of a Prussian Treasury Note, on the ground that there was no translation of the note which was in a foreign language. It was said that the court should be enabled to form an opinion whether the instrument was what it was alleged to be.

ALDERSON, B.—But here that which is alleged to be forged is set out, and is translated. Your objection seems to be that something else is not set out.

*Huddleston*.—But that which is set out is not within the statute, unless it is connected with something else. The court cannot say that this is part of an undertaking unless they see what the undertaking is.

ALDERSON, B.—The prisoners are charged with forging a part of some undertaking: how can the prosecutor set out the undertaking, of which this was intended to be a part, when it is in fact unfinished? It is part of a class of undertakings, not of any specific one.

*Huddleston.*—But there is nothing on the face of the indictment to satisfy the court that the instrument intended to be imitated was an undertaking at all.

*CRESSWELL, J.*—Suppose that there are undertakings current in Russia for five, ten, and twenty roubles, and no more, and an instrument similar in all other respects was forged for thirty roubles, there would be no valid undertaking of that precise character which could be set out, but would not that be a forgery?

*Huddleston.*—I think not.

*ALDERSON, B.*—On the principle, you mean, that no man now could be guilty of forging a one pound or a two pound Bank of England note.

*CRESSWELL, J.*—Suppose then, Mr. Huddleston, that you had never accepted a bill of exchange, and that some one forged your acceptance, would not that be an offence, although there may be no genuine instrument of which the forgery was an imitation?

*Huddleston.*—There the whole instrument would be forged, and it would not be necessary to set out any valid bill; but this is under a statute which makes the forging a part of an instrument an offence, and I contend that it cannot appear to be a part without setting out the whole.

*ALDERSON, B.*—But is there not an averment that there were such undertakings current in Russia, and that this is a part of one such?

*Huddleston.*—That might have been urged in the case of *R. v. Goldstein*; if it is a mere matter of evidence, then in that case it might have been shown, when the instrument was translated, that it was in fact what it was alleged to be, but the court held that the nature of the instrument must appear on the face of the indictment.

*ALDERSON, B.*—But you cannot apply the word “purport” to an incomplete instrument, as you can to a complete one, because the paper might be a part on which only one or two words were engraved, and those words might of themselves have no purport whatever.

*Huddleston.*—In *R. v. Hunter* (2 Leach, 624), it was held, that where the indictment charged a prisoner with forging a receipt to an assignment for the payment of a certain sum in a navy bill, and the tenor of the receipt as set forth merely consisted of the signature of the party, the indictment was defective.

*ALDERSON, B.*—No doubt it is not every signature of another man’s name that will constitute forgery. The signature must be connected with the instrument alleged to be forged. But that is done here by averment. Suppose in this case the prosecution had gone further, and set out a valid undertaking, how could you tell, except by averment, that it was a foreign instrument?

*Huddleston.*—The same argument might have been urged in *R. v. Goldstein*.

*ALDERSON, B.*—And I do not see how it is answered. Take the case of a navy bill. Suppose a man is charged with forging

REG. .  
v.  
FADERMAN  
AND OTHERS.  
—  
1850.  
—  
Jurisdiction—  
Demurrer—  
Forgery.

Argument on  
the demurrer.

REG.  
v.  
FADERMAN  
AND OTHERS.

1850.

Jurisdiction—  
Demurrer—  
Forgery.

a receipt to such a document, and that the forgery consists in signing another person's name at the back of the bill; this of itself would not purport to be a receipt, and it is only by averments that it can be shown to be one. Suppose that a valid undertaking had been set out, and then, in setting out the part forged, it appeared that there was a variance of one or two words, you would say that it did not purport to be a part of a valid document; but would it not be an offence? According to your argument, it might be impossible to draw any indictment at all, although it was clear that a crime had been committed.

*Huddleston*.—In *R. v. Bond* (4 Cox Crim. Cas. 231), it appeared that the decision of the court would render it difficult, if not impossible, to draw any indictment for certain offences under certain circumstances; but there the argument *ab inconvenienti* was allowed to have no weight whatever. Not only are the parts forged alleged here to be parts of an undertaking, but parts of an undertaking purporting to be parts of one of the said foreign undertakings for payment of foreign money of the said foreign state, to wit, the Empire of Russia. The meaning of the word "purport" is illustrated in *Gilchrist's case* (2 Leach, 657.) There it is said the purport of an instrument is that alone which appears on the face of it; and it was held further, that an averment was not sufficient to make up for what was omitted from the indictment. So in *Reading's case* (2 Leach, 590), the indictment alleged that a bill purported to be directed to one J. King, by the name and description of one J. Ring, and Buller, J., in delivering the opinion of the judges, said, "It is clear that where an instrument is to be set forth, a description that it purports a particular fact necessarily means that what is stated as the purport of the instrument appears on the face of the instrument itself."

Argument on  
the demurrer.

ALDERSON, B.—Those are cases in which the real purport was contrary to what was alleged to be so. Here there is no inconsistency whatever. The averment gives the additional meaning to the instrument. Where it purports to be one thing, it cannot be averred to purport to be another; but where it purports to be one of several things, an averment may properly declare which. *Edsall's case* (2 Leach, 662), is distinguishable upon this principle, and the principle itself seems to have been acted upon in *Reeve's case* (2 Leach, 808; 2 East P. C. 984.) There it was alleged that a receipt, signed C. Ollier, purported to be signed Christopher Ollier, and it was thought to be unobjectionable, because there was no repugnancy.

*Parry* was then heard on the question as to whether or not the judgment on the demurrer was final.—In civil cases the judgment is final, because the matter in the previous pleadings is confessed; but nothing is taken to be admitted in a criminal case, and the prisoners here merely ask the opinion of the judges whether, in point of law, they are to be called upon to answer the indictment.

ALDERSON, B.—In 2 Hawkins, 334, it is said, "that if a prisoner demurred to the indictment in criminal cases, the court would

give final judgment against him." In 4 Bl. Com. 431, it is laid down that, "if judgment be against a defendant, and the offence for which he is indicted be a misdemeanor or a felony, but not capital, such judgment, according to the better authorities, is final; and even in capital cases, some have held that if, on demurrer, the point of law be adjudged against the defendant, he shall have judgment of execution as if convicted by verdict."

REG.  
v.  
FADDERMAN  
AND OTHERS.  
—  
1850.  
—  
Jurisdiction—  
Demurrer—  
Forgery.

*Parry.*—In Arch. Cr. Pl. 81, 7th ed., it is said to be at least doubtful whether, in a felony, the judgment is or is not final.

ALDERSON, B.—And in 1 Starkie, 315, it is observed, "by a demurrer the defendant refers it to the court to pronounce whether, admitting the matters of fact alleged against him to be true, they, in point of law, constitute him guilty of the offence charged." The question then is, whether humanity is to prevail against principle.

*Parry.*—But universal practice, especially in criminal cases, becomes principle, and the necessity for demurring is much increased since the 7 Geo. 4, c. 64, which declares that many defects shall be cured by verdict. In 2 Hale P. C. 257, it is said, "and regularly in all cases of felony or treason, where a man pleads a special matter, though he concludes his plea with not guilty to the felony, or do not conclude it so, yet if his plea be tried, or found, or ruled against him, he shall be put to his plea of not guilty, and be tried for the felony; for, though a man shall lose his land in some cases for mispleading, yet he shall not lose his life for mispleading."

ALDERSON, B.—That clearly applies to cases that are capital; but then all felonies, except petty larceny, were so; for you could not tell, in grand larceny, that a man would not be hanged, because he might not plead his clergy; the rule is always laid down as one *in favorem vite*. Respondens ouster.

*Parry.*—But the question is, whether that does not mean where judgment would render a man civilly dead. Suppose a person pleads a pardon. There is a confession; but, if found against him, the judgment shall be *respondeas ouster*: (2 Hale, 256.)

ALDERSON, B.—In that case there is no confession; the prisoner merely says, if I was guilty of that offence I have been pardoned. Here the prisoner says, I have done what is alleged against me, but it does not constitute a crime.

*Parry.*—There is no further confession in this case than in the former; the prisoner may just as well be supposed to say, if I have done what is here charged, it is no crime. In *R. v. Purchase* (C. & M. 617), Patteson, J., expressed a decided opinion that a party demurring to an indictment for embezzlement might, on judgment being given against him, plead over. In the case of *Gray v. R.* (11 Cl. & Fin. 437), a majority of the judges were of opinion that a prisoner, although indicted for a crime that was not capital, was entitled to challenge jurors peremptorily, notwithstanding that the privilege was generally said to be *in favorem vite*. In some recent cases the question has been mooted whether a defendant could

REG.  
v.  
FADERMAN  
AND OTHERS.  
1850.  
Jurisdiction—  
Demurrer—  
Forgery.

demur and plead at the same time: (*R. v. Odgers*, 2 Moo. & Rob. 479.) In *R. v. Phelps* (Car. & Mar. 180), Coltman, J., observes, "I am inclined to think that a prisoner may demur and plead over to a felony at the same time; at all events, I am clearly of opinion that he may demur, and if the demurrer shall be decided against him, he may plead over to the felony."

WILLIAMS, J.—In the case of a dilatory plea, there seems no inconsistency in pleading not guilty with it.

ALDERSON, B.—And where there is a demurrer and a plea of not guilty at the same time, we cannot give judgment of *respondens ouster*, because the prisoner has pleaded already; and we cannot give final judgment, because we have already allowed him to plead a plea which remains undisposed of on the record.

Parry.—In *R. v. Adams* (Car. & M. 299), Coleridge, J. allowed a prisoner to demur and plead at the same time. It is true that in *R. v. Bowen* (1 C. & Kir. 504), Tindal, C. J. suggested that a party might be bound by a demurrer, but that was the newly-created offence of having destroyed a register, which never was a capital felony, and there may be a distinction between such cases and the present one.

CRESSWELL, J.—In *Gray v. Reg.* the Chief Baron seems to be of opinion that when the capital punishment is taken away simply, and a different punishment awarded by law, all the other incidents remain the same. Now, the charge here never was a capital one. It is made a felony by an act passed subsequently to the repeal of the punishment of death.

ALDERSON, B.—You will find many *dicta* in the books, that peremptory challenge was given in all cases of felony.

Parry.—In *R. v. Taylor* (3 B. & C. 312), which was a case of misdemeanor, it was held that the judgment was final on demurrer; but in this, and in many other cases, the distinction is always stated to be between misdemeanor and felony generally, without drawing any distinction between capital and other felonies. In the case last named, *in favorem vitæ* seems to be analogous to *in favorem liberatis*.

ALDERSON, B.—If that is so, why should not the principle be extended as well to misdemeanors as felonies, since they are generally punishable by imprisonment?

Parry.—In *R. v. Serva* (1 Cox Crim. Cas. 292; 2 C. & K. 53), the prisoners demurred to the indictment, and were afterwards allowed to plead not guilty on judgment given against them. So also in *R. v. Duffy* (4 Cox Crim. Cas. 24), a case which lately occurred in Ireland, and which was fully and elaborately discussed, the same course was pursued. In Rastall's Entries, 584, the question was raised as to a plea of sanctuary, and it would seem there that the judgment against the prisoner was not final.

CRESSWELL, J.—But that has nothing to do with the question. Here there is a confession; there, there was none.

ALDERSON, B.—The plea of sanctuary was called a declinatory plea. The prisoner there said the crown had no right to make him

Respondens  
ouster.

plead at all, so that the very nature of the judgment against him was, that he should answer over. He said he would not plead, and the court said he must.

*Parry.*—The words of our demurrer are, that the prisoners ought not to be bound to answer the indictment, because it is not sufficient in law. If the court is against the demurrer, the natural reply is that they must answer.

*CRESSWELL, J.*—But the form of the joinder in demurrer is, that the prisoner ought to be compelled to answer, and judgment of conviction is prayed.

*Parry.*—In *autrefois acquit* or *autrefois convict*, the judgment is, that the prisoner shall plead over.

*ALDERSON, B.*—But the question there is as to the identity of the offence. If found against the prisoner, all that is decided is, that that of which he has been convicted or acquitted is not the same as that with which he is immediately charged. Here he admits the facts in the indictment. There he admits other facts, and asks whether they are not those alleged against him. In 1 Chitty's Crim. Law, 442, the distinction between a demurrer in bar and a demurrer in abatement is clearly laid down. In the one case the judgment is final, in the other it is *respondeas ouster*.

*Metcalf* (on the same side.)—In 2 Hale, 255, 257, the cases cited are distinctly in favour of the prisoners. No admission can be made by a prisoner in a case of felony.

*ALDERSON, B.*—Surely this is not so. If a man were to say upon his trial that he was guilty, probably the jury would think he spoke the truth, and might say so by their verdict. Respondeas ouster.

*Metcalf.*—Yes, it might be evidence to go to the jury, but it could not be taken as a fact proved without the intervention of a jury. With regard to the first point, it is a well-known principle that a foreign document must be construed according to the foreign law. What proof is there that by the Russian law this is either an undertaking or a promissory note.

*ALDERSON, B.*—Your argument would go the length of saying that the Russian law should be set out. Is not that a *reductio ad absurdum*?

*Metcalf.*—And yet what other means has the court of saying that this instrument is what it is alleged to be, since it is an acknowledged principle that it will not take notice of foreign laws: (Story's Conf. of Laws, 527; *Trimbey v. Vignier*, 1 Bing. N. C. 151.) In *Rothschild v. Currie* (1 Q. B. 43), the foreign law was set out; and in *Benham v. E. Mornington* (3 C. B. 133), a case of debt on bond, the laws of France with reference to the matter were stated. So in *Astley v. Fisher* (18 L. J. 59, C. P.; 6 C. B. 150), defendant pleaded certain facts, and that by reason thereof he was entitled to a lien, and it was held that he should have shown what was the law of New South Wales upon the point. Even in this country, although a public act need not be set out, a private one must.

The *Attorney-General* (with whom were *Clarkson* and *Ballantine*

REG.  
v.  
FADERMAN  
AND OTHERS.  
—  
1850.  
—  
Jurisdiction—  
Demurrer—  
Forgery.



REG.  
v.  
FADERMAN  
AND OTHERS.  
—  
1850.  
—  
*Jurisdiction—  
Demurrer—  
Forgery.*

for the prosecution).—First, as to the six last counts. The words of the 2 & 3 Will. 4, c. 123, s. 3, will apply to every instrument which is made the subject of forgery or false making. The word “forging” has a much wider sense than has been given to it by the counsel for the prisoners. It is observable that the statute applies to the forgery of an instrument as well as of a writing. Now in the 1 Will. 4, c. 46, there is a great number of acts mentioned to which the word “forgery” might not in its restricted sense apply, such as making false entries in registers, wilfully inserting matter in certain documents, &c.; but it is submitted that the 2 & 3 Will. 4, c. 123, is applicable to every thing, the false making of which was declared by that act to be a crime. It is said that these counts should state the nature of the coin, its value, &c., because that would be necessary in an indictment for larceny, but all that is necessary to be done is to describe the article with reasonable certainty. If you describe it by the name by which it is known, that is sufficient. It has been said that Littledale, J. in *R. v. Harris*, threw out a suggestion that the last-mentioned statute could only apply to English instruments.

ALDERSON, B.—No; only to those which were the subject of forgery.

CRESSWELL, J.—Surely the forgery of a foreign bill would be within the statute.

WILLIAMS, J.—But suppose that the offence charged was, that he had made a plate for the purpose of engraving a foreign bill.

Argument for  
the prosecution.

*Attorney-General*.—The charge here is that he did forge a certain instrument.

CRESSWELL, J.—No; the difficulty is that you do not charge it as a forgery. You say that he made and engraved without leave. It is more like a charge of infringing a patent.

*Attorney-General*.—But what is making an engraving under the circumstances alleged unless it be forging? *A fac simile* of handwriting may be engraved, but surely that would be a forgery. Forgery is a generic term, which includes engraving within it.

CRESSWELL, J.—A man does not as a matter of course forge an entry who makes a false one. He may do so, but not necessarily.

*Attorney-General*.—Not unless it is one specially prohibited; but here there is no doubt that the act of which the charge consists is such, and the only question raised is as to the manner in which it is charged. Then as to the objection, that a genuine undertaking ought to have been set out, I contend that if there never was an undertaking or a promissory note of the Emperor of Russia, such as we are in a condition to prove, yet, if the prisoners have engraved a part of an instrument purporting to be such an undertaking, they have committed the crime alleged in the indictment.

CRESSWELL, J.—At present I am of that opinion.

*Attorney-General*.—Then how can we be expected to set out that which may never have existed? The Emperor of Russia may have announced an intention, on a given day, to issue a paper currency,

and in anticipation of his so doing, these forgeries may have been resorted to. Then as to the objection that these parts do not purport to be parts of an undertaking. One of these parts is a mere picture. How are we to describe it differently from what we have done? we say it is part of an undertaking, and we afterwards must prove it to be so.

CRESSWELL, J.—The objection turns entirely on the meaning of the word “purport.” The other side says that the instrument must show on the face of it what you say it purports to be.

*Attorney-General*.—The distinction has been already drawn that where the instrument set out does not contradict the averment, it is sufficient. We say this has a certain meaning, what is there to show on the record that it has not that meaning? Our evidence will show that it is what we have averred, and that might be contradicted by evidence if it were otherwise.

WILLIAMS, J.—You would say then, that if a person had got no further in the forgery of a bank-note than the making the figure of Britannia in the corner, that that purported to be part of a bank-note.

*Attorney-General*.—If to engrave a part of a note is an offence, under this statute, then the present indictment must be good, because it is the only way in which it could be drawn. The statute uses the word “purport,” and we have precisely adopted its language.

ALDERSON, B.—How, under any circumstances, could we tell without extrinsic evidence, whether it is part of a foreign note or not? The case of *R. v. Goldstein* and the other cases cited were those in which complete instruments were forged. Take the case of the forgery of the figure of Britannia on an engraved plate, how could it be made to appear on the face of the indictment, without evidence, that it was part of a genuine note? It must be proved by witnesses, and the jury must find it.

*Attorney-General*.—Suppose a genuine note was set out in the indictment, still the setting out a part would not show that it purported to be a part of a genuine one, we must still resort to an averment to that effect; and if the forging a part of what never existed is within the act, then we have surely a sufficient excuse for not setting out a valid document. All that it can be essential to set out is the instrument forged, and that is done here. Then as to the nature of the judgment on demurrer. By the demurrer itself the prisoners pray that they may be discharged, we on the contrary pray that they may be convicted. This is a question which comes formally before a court for the first time, because in all those cases in which opinions have been expressed there has been no demurrer properly drawn up; and those opinions in favour of a judgment of *respondeas ouster* have been adopted rather on the ground of mercy than on that of any definite principle. If this was a plea in confession and avoidance, instead of a demurrer, no doubt the judgment would be final.

ALDERSON, B.—Every demurrer does not involve a confession, as, for instance, where it is with respect to the name.

REG.  
v.  
FADERMAN  
AND OTHERS.  
—  
1850.

*Jurisdiction—  
Demurrer—  
Forgery.*

*Argument for  
the prosecution.*

REG.  
v.  
FADERMAN  
AND OTHERS.

1850.

Jurisdiction—  
Demurrer—  
Forgery.

*Attorney-General.*—In *R. v. Purchase*, it is true that Patteson, J., thought the judgment on demurrer was not final, but there was no argument on the point, and other judges both publicly and privately have expressed opinions the other way. In *R. v. Serra* it does not clearly appear whether there was any former judgment given, or whether the demurrer was allowed to be withdrawn; the report merely states that the demurrer was overruled; at all events that was a capital case and therefore inapplicable to this discussion. The charge in *R. v. Duffy* was treason before the late act of Victoria making certain treasons felony, and was therefore capital; and if there is anything in the suggestion that the rule is *favorem vite* applies to all cases that were once capital, although no longer so, the answer is, the crime alleged in this indictment never was a capital one. *R. v. Gray* has no bearing on the question, because, as Lord Campbell there says, the rule as to challenging jurors was well established, and has been recognized by the Legislature in felonies which are not capital.

ALDERSON, B.—The act of Henry 8, as to challenges, expressly refers to felonies: that is the rule, the reason of it might be that it was in *favorem vite*.

*Attorney-General.*—The prisoners have chosen to take this course after full notice, they have perfect liberty to take advantage of any legal technicalities in the way they have done; but if they do so, they must also take the risk. If this course were to be generally pursued the statute of Geo. 4 would become a nullity.

Argument for  
the prosecution.

*Huddleston* (in reply.)—It is said that the act of Parliament is applicable, although such an undertaking as the prisoners are charged with forging never had an existence, but the prosecutors have alleged that they have an existence, and that they are current in Russia, and therefore there could be no difficulty in setting them out. Supposing it not necessary to set out the undertakings, still something should be set out to give a meaning to the word "purport," for at present it has none; but surely if a man is charged with forging something which purports to be something else, the court should have the opportunity of seeing on the face of the record what that purport really is; it is not only necessary that the court below should be satisfied that it is what it is alleged to be, which they may be convinced of by evidence, but the Court of Error should have some means of coming to the same conclusion. We have pointed out a course by which the indictment might have been drawn without objection, but even if it were not so, that would be no answer to what we suggest.

Judgment.

ALDERSON, B.—But it would be a great absurdity for us so to construe this act of Parliament that no indictment could be drawn upon it.

The learned Judges took time to consider their judgment, which was on the following morning delivered by

ALDERSON, B.—We have taken time to consider the various questions raised; and the first point on which it is necessary to decide is, whether the demurrer to the indictment can be sustained, and we all think that it must be overruled. It is quite sufficient

There is any one count which will support a judgment of conviction. This is an indictment framed under the 1 Will. 4, c. 66, which enacts, that "if any person shall engrave, or in any manner make upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange, promissory note, undertaking, order for payment of money, or any part of any bill of exchange, promissory note, undertaking, or order for payment of money, in whatever language or languages the same may be expressed, and whether the same shall or shall not be, or intended to be under the name of, or purporting to be a bill, note, undertaking, or order, or part of a bill, note, undertaking, or order, of any foreign Prince or State, or of any minister or officer in the service of any foreign Prince or State, &c., without the authority of such foreign Prince or State, minister or officer," &c., he shall be subject to the penalties mentioned in the act. It will be, in the first place, desirable to ascertain what is the meaning of the words "purporting to be a bill, or part of a bill," &c., and it appears to me that we must construe it in this way: If it be a complete bill or note, then it must appear on the face of it to be what it is alleged it purports to be; but that word, when it is used in reference to part of a bill or note, cannot be construed in the same manner, for part of a bill cannot purport to be anything; when applied to a part, it must mean that it is part of a bill or note which, if complete, would purport to be what is required in the act. This is the only reasonable construction which can be put upon the statute. When a prisoner is charged with forging part of an instrument, we must be satisfied not from the mere averments looking at the indictment, but by proper averments and by intrinsic proof, that the instrument, when complete, would be what it is stated to be. The cases cited to us on behalf of the prisoner were cases where the instruments were complete. There was no necessity to set them out, to give the judges information as to the punishment to be awarded, as well as for the information of the prisoners themselves. Here the prosecutors have set out the relevant parts, and have made averments that they are parts of undertakings of a foreign Government, and for the payment of money, and we think nothing more need be alleged. The first thirty-four counts are therefore, in our judgment, sufficient. The last six cannot be sustained, and that upon another ground, namely, that they are not within the 2 & 3 Will. 4, c. 123, inasmuch as that applies and is confined to indictments for forgery, and this is not, and also to complete instruments, and not to parts, because they only can be described as in an indictment for forgery. Then comes the much more difficult and important question, as to what judgment is to be given by the court on their ruling the demurrer; and we have taken time since yesterday to look fully into the authorities on the subject. It is a question which has very seldom come before judges in modern times, and, from my own experience of twenty years, this is the first time it has been raised before me. On full investigation, I have no doubt

REG.  
v.  
FADERMAN  
AND OTHERS.  
—  
1850.  
Jurisdiction—  
Demurrer—  
Forgery.

Judgment.

REG.  
v.  
FADERMAN  
AND OTHERS.

1850.

Jurisdiction—  
Demurrer—  
Forgery.

Judgment.

that the judgment must be a final one. It appears to me clear enough that any plea in confession and avoidance of a felony, if decided against a prisoner, subjects him at once to all the consequences of a confession. This is according to every rule and principle of pleading. It is with reference to the old law of appeal that we shall find most of the authorities on the question before us, for it has seldom been mooted in cases of indictment. In appeals of felony there were several pleas which did not confess the felony at all. For instance, where the appellant was the brother of the party killed, it was competent to plead his bastardy, or that he had an elder brother to whom the plea belonged, and there is an instance in the Year Books, 7 Edw. 4, in which that last-mentioned plea was pleaded, and the question arose whether there was an elder brother of the whole blood or half-blood; in one case the appellant would be entitled to the appeal, in the other not. There the plea did not go to the confession of the crime itself. Whatever might be the guilt or innocence of the accused, the question raised was merely whether he was appealed by the right person. So, again, if a woman appealed a man of the death of her husband, it was competent to plead that they were never accoupled in lawful matrimony, and that was tried by the certificate of the bishop. Here also, the question of guilt or innocence is untouched. In 2 Hale, 237, there is a case in which a person, indicted as *Alan Gerard*, pleaded that he ought to have been indicted by the name of *John Allen*, and the Attorney-General, instead of demurring, replied that he was as well known by one name as by the other. Here, then, is another instance in which guilt is neither confessed nor avoided. There is a great number of others of the same character; amongst them those of *autrefois* convict and *autrefois* acquit, and many other dilatory or declinatory pleas. It seems to have been the practice in older times to plead the plea of not guilty with the declinatory plea. In 2 Hale, 255, it is said—"Regularly, where a man pleads any plea to an indictment or appeal of felony that doth not confess the felony, he shall yet plead over to the felony *in favorem vite*, and that pleading over to the felony is neither a waiving of his special plea, nor makes his plea insufficient for doubleness." That shows distinctly that the two were pleaded together, and they well might stand together but for the objection of doubleness; and *in favorem vite* the courts would not allow this to prevail. But this practice was always confined to those cases where the plea, together with which that of not guilty was pleaded, did not confess the felony; for, if it did, then the pleading would not only be double, it would be contradictory. If the other cases are fully examined, this will be found to be the solution of the difficulty that has arisen on the subject. Even in those cases where a plea is pleaded that does not confess the matter at issue,—in misdemeanors and in civil suits,—the judgment against the defendant on such a plea is final. But in felonies it is said the indulgence of the common law was applied to mitigate the ordinary and general rules of pleading,

*in favorem vite*, and in all capital cases, therefore, the defendant was allowed to plead over, but he was never allowed to plead a plea in confession and avoidance, at the same time with a plea of not guilty. And where the plea was not in confession, and might be pleaded at the same time with not guilty, Lord Hale mentions that a defendant should take care that they are pleaded together, for, if not, he may lose the advantage he would otherwise obtain from the indulgence the law gives; and he puts some instances which clearly show that it was a mere indulgence, and that a party, in order to avail himself of it, was obliged, according to strictness, to plead not guilty at the same time with his dilatory or declinatory pleas, or any special one which did not confess and avoid the felony. That being the case, we find we have authorities distinctly to show that, on pleading a plea in confession and avoidance, which was determined against a prisoner, the judgment was final, and he was not allowed to plead over. So it was in the case of a general demurrer. But then comes the difficulty arising from Lord Hale's observation on the case in the Year Books, 14 Edw. 7, and which seems to have misled those learned judges whose *dicta* have been quoted to us, and who, in the hurry of *Nisi Prius*, had not the opportunity which we have had of looking into the authorities. Lord Hale speaks of that decision, which is expressly in point, that it is to be understood "*cum grano salis*." But, in saying so, he does not mean to question its validity, but only to apply to it a distinction which the court, on the present occasion, is prepared to act upon; otherwise he would have said that it ought not to be attended to at all, but, on the contrary, he says that it is a good opinion if you do but understand it aright. It was a case which came before all the judges in the Exchequer Chamber. A prisoner, having pleaded, refused to put himself upon the country, and it was considered by some of the judges that he might have judgment as if he had confessed; by others, that he might be put to the *peine forte et dure*; and Choke, J. says, by way of illustration, "If a person be indicted or appealed of felony, and he will demur to the indictment or appeal, and it be adjudged against him, he shall have judgment to be hanged." Now it is upon that observation, made by one of the judges in the course of the argument, and very much to the point,—an observation, moreover, to which the other judges assented,—that Lord Hale says it is to be understood *cum grano salis*, and that it cannot be taken generally that, if a man demurs, and the demurrer is decided against him, the judgment must be final. He means that in some cases it is final, and in others it is not. Then the question is, what cases are within the rule, and what are to be excluded; and, then, does the present case come within one branch or the other? Now, it seems to me that the rule which is applied to pleas generally applies to demurrers also. Where the plea is a plea in confession and avoidance, the party has final judgment upon his plea being adjudged against him, but where it is dilatory or declinatory, and might well be pleaded with not guilty, he has

REG.  
v.  
FADERMAN  
AND OTHERS.  
—  
1850.  
—  
Jurisdiction—  
Demurrer—  
Forgery.

Judgment.

REG.  
v.  
FADERMAN  
AND OTHERS.  
—  
1850.  
Jurisdiction—  
Demurrer—  
Forgery.

Judgment.

only judgment against him upon that plea, and is permitted to be tried: indeed he has a right to be tried upon the plea of not guilty, where he had pleaded it with that plea. Even where he had not, it seems to have been the habit of the judges, as a mere indulgence, to give him the same advantage, and to permit him, in cases of capital felony, that is to say, in all cases of felony—for I do not mean to make any distinction between them—to take his trial upon the merits. Lord Hale appears, therefore, to mean that the doctrine laid down must be subject to the same rules as were applicable to the case of a special plea, and that where the demurrer really confesses and avoids the charge, judgment upon it against the prisoner is to be considered final; but that where the demurrer is what is called a demurrer in abatement, there judgment is not final. Some demurrers are to the jurisdiction of the court, and we had a case cited from Dyer, 38, of a demurrer to the jurisdiction, which demurrer might well stand with a plea of innocence, and there, after demurrer adjudged against the party, he had an opportunity of pleading not guilty, because he might plead that probably with a demurrer. There was, too, a demurrer in a celebrated case in Wilson, to an appeal of death, in the time of Lord Mansfield. There they pleaded to the appeal of death, praying that the writ might be quashed, and they pleaded with that plea a plea of not guilty to the felony, as they might well do, seeing that their plea went to the quashing of the indictment, and not to a confession of it, and there was judgment in favour of the defendant. So, again, some pleas are called by Hawkins demurrers in abatement. Now to these the indulgence which Lord Hale speaks of applies, and the prisoner was allowed to plead over after demurrer adjudged against him; but it seems doubtful, in case he had not pleaded not guilty with the demurrer, and afterwards refused to plead it, whether or not the court must not have given judgment final against him, because they could not compel him, after having once demurred, to plead by *peine forte et dure*, for the demurrer was in the nature of a plea. And this is said by Lord Hale (P. C. 315): "If a man indicted for felony demur to the indictment, and will not otherwise answer, this is no standing mute; but if the demurrer be ruled against him, he shall have judgment of death." And therefore it appears that even in those cases in which, by the indulgence of the law, he was permitted to plead over, inasmuch as he could not be compelled to do so after the demurrer was overruled, if he refused so to plead, he was to have judgment of death: that was the only way in which the court could proceed against him. This seems to me decisive of the question that the strict rule of law was that the judgment was final, and that it was only by the indulgence of the court that the party was allowed to come in and plead not guilty in those particular cases to which the indulgence was applicable. If he had lost the opportunity by not pleading not guilty with the demurrer, in that case there was nothing on the record but the demurrer, and the strict judgment (although it was in certain

cases relaxed) was a final one. If that was so, it decides the present case, because there is nothing upon the record but the demurrer. No plea of not guilty pleaded with it, neither could it be so pleaded, for then the demurrer and plea would be contradictory. Therefore it seems to me, upon the whole case, this being a general demurrer, that it does contain a confession, and that the permission to plead not guilty afterwards is an indulgence granted by the court only in those cases in which the demurrer is what is called a demurrer in abatement, and this is not one of that description. The judgment is a final judgment. We have looked into the modern authorities that have been cited to us which, we repeat, only appear to be judgments given at *Nisi Prius*, and are not therefore of that weight to which they would otherwise be entitled from the knowledge and learning of those learned judges whose names are appended to them. The cases seem to us not to have been so fully considered as under other circumstances they might have been, and we are compelled, therefore, to decide against them.

*Parry* requested to be allowed to withdraw the demurrer, that the prisoners might plead, and be tried upon the merits.

ALDERSON, B.—We cannot accede to any such request. The prisoners have taken the risk, and they must abide by the consequences.

The *Attorney-General*, *Clarkson*, and *Ballantine* for the prosecution.

*Huddleston*, *Parry*, and *Metcalf* for the prisoners.

REG.  
v.  
FADERMAN  
AND OTHERS.  
—  
1850.  
—  
Jurisdiction—  
Demurrer—  
Forgery.

## CENTRAL CRIMINAL COURT.

MARCH SESSION, 1850.

March 8.

REG. v. AUSTIN. (a)

*Grand Jury—Bill—Practice.*

*Where the grand jury have ignored a bill, the court will not permit a second bill of a like nature to be presented to them at the same session.*

THE grand jury having come into court, and delivered in, amongst others, a bill against the above prisoner, for arson, which they had ignored.

*Robinson* said that he was instructed to ask the court to direct the

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.



REG.  
v.  
AUSTIN.  
—  
1850.

Practice—  
Grand jury.

grand jury to reconsider the bill. Only five out of twelve witnesses had been examined, and the remaining seven were prepared to give material evidence in support of the charge.

*Payne* (for the prisoner) contended that such an application was unprecedented. What occurred in the grand jury room could not be made the basis of any motion in the full court, nor could the reasons which induced the grand jury to ignore the bill be inquired into.

The RECORDER.—I cannot interfere with the decision of the grand jury, nor inquire into the grounds on which they have acted, but I see no objection to a fresh bill being sent up to the grand jury, before they are discharged, and then all the witnesses may be examined.

Another bill was accordingly sent up, but when the grand jury came into court to return it,

*Payne* objected to its being received, on the ground that it was not competent for the prosecution at the same sessions to send a second bill before the grand jury on the same facts, after they had ignored the first. He referred to *R. v. Humphrey* (C. & M. 601), before Mr. Justice Patteson, on the Oxford circuit; in that case the grand jury threw out a bill containing a charge of burglary, upon which another bill was sent before them. The foreman of the grand jury came into court to consult the learned judge as to the course they should pursue, and he held that a second bill could not be preferred upon the same facts at that session before the same grand jury.

The RECORDER (after consulting WIGHTMAN, J.):—The learned judge is of opinion that the same grand jury ought not to be called upon to reconsider the same facts which have induced them to throw out a bill, on a similar bill being presented to them. I think, therefore, I ought not to receive this presentment, but should act on the previous one which has been recorded; I thought at first that there was no objection to a second bill going up, but I find it is opposed to the general practice, and there is on principle a very good reason why it should not be done, for if two bills may be presented, so may three or more, and the labours of a grand jury would be most inconveniently increased; I shall therefore request Mr. Clark (the clerk of the arraigns) to let the present decision stand recorded as a rule, that the same bill shall not be sent a second time before the same grand jury, as it would be only calling upon them to go through the same facts on which they had already come to a decision.

## CENTRAL CRIMINAL COURT.

APRIL SESSION, 1850.

April 13.

(Before BARON PLATT.)

REG. v. TIDDEMAN, BENNETT, AND OTHERS.

*Threatening to accuse of an infamous crime—Indictment.**On an indictment for threatening to accuse of an infamous crime, with intent to extort a certain security for money :**Held, not necessary to aver to whom the security belonged.***T**HE prisoners were charged upon the following indictment:—

Central Criminal Court, } The Jurors for our Lady the Queen Indictment.  
to wit. } upon their oath present, that Henry  
Tiddeman, late of the parish of Saint Giles in the Fields, in the  
county of Middlesex, and within the jurisdiction of the Central  
Criminal Court, labourer, John Bennett, late of the same place,  
labourer, William Landler, late of the same place, labourer, John  
Jones, late of the same place, labourer, otherwise called John Joyce,  
and John Sullivan, late of the same place, labourer, on the 2nd  
day of March, in the 13th year of the reign of our Sovereign  
Lady Victoria, at the parish aforesaid, in the county aforesaid, and  
within the jurisdiction of the said court, feloniously did threaten  
one Samuel Wyatt to accuse him the said Samuel Wyatt of  
having committed the abominable crime of buggery with the said  
Henry Tiddeman, with a view and with the intent in so doing  
then and there and thereby to extort and gain from the said Samuel  
Wyatt a certain valuable security for the payment of money, to  
wit, a security for the payment of the sum of fifty pounds, against  
the form of the statute in such case made and provided, and  
against the peace of our said Lady the Queen, her crown and  
dignity.

*The second count* alleged that the prisoners feloniously did accuse the said Samuel Wyatt of having committed the abominable crime, &c., with the said Henry Tiddeman.

*Third count.*—That they feloniously did threaten the said Samuel Wyatt to accuse him the said Samuel Wyatt of having attempted and endeavoured to commit the abominable crime, &c., with the said Henry Tiddeman.

*Fourth count.*—That they did accuse the said Samuel Wyatt of

REG.  
v.  
TIDDEMAN,  
BENNETT,  
AND OTHERS.

1850

Threatening to  
accuse—  
Indictment.

having attempted and endeavoured to commit the abominable crime of buggery with the said Henry Tiddeman.

*Fifth count.*—That they feloniously did threaten the said Samuel Wyatt to accuse him the said Samuel Wyatt of a certain infamous crime, that is to say, of having made to the said Henry Tiddeman a certain solicitation, whereby to move and induce him the said Henry Tiddeman to commit with said Samuel Wyatt the abominable crime, &c.

*Sixth count.*—That they did accuse the said Samuel Wyatt of a certain infamous crime, that is to say, of having made to the said Henry Tiddeman a certain solicitation, whereby to move and induce him the said Henry Tiddeman to commit with the said Samuel Wyatt the abominable crime, &c.

*Seventh count.*—That they did threaten the said Samuel Wyatt to accuse him the said Samuel Wyatt of having committed the abominable crime, &c.

*Eighth count.*—That they did accuse the said Samuel Wyatt of having committed the abominable crime, &c.

*Ninth count.*—That they did threaten the said Samuel Wyatt to accuse him the said Samuel Wyatt of having attempted and endeavoured to commit the abominable crime, &c.

*Tenth count.*—That they did accuse the said Samuel Wyatt of having attempted and endeavoured to commit the abominable crime, &c.

*Eleventh count.*—That they did threaten one Samuel Wyatt to accuse him the said Samuel Wyatt of having committed the abominable crime, &c., with the said Henry Tiddeman, with a view and intent thereby to extort money from the said Samuel Wyatt.

There were nine other counts, only varying from the first ten as the eleventh did in alleging the intent to be to extort money. There was no allegation in any count as to whose property the security or the money was.

*Parnell, Woollett, and Prendergast* (for the prisoners), severally contended, in arrest of judgment, that the indictment was defective for not alleging that the security sought to be obtained was the property of the prosecutor. In *R. v. Parker* (3 Q. B. 292), which was a charge of conspiracy to obtain money by false pretences, it was held necessary to show to whom the property belonged. So, in *R. v. Norton* (8 C. & P. 186), which was a charge of obtaining money by false pretences, a similar defect was held fatal.

PLATT, B.—But whose security should the indictment allege it to have been? The instrument obtained was an I O U, and it would be of no value in the hands of the maker.

*Parnell.*—But it is alleged to be a valuable security, and must have been of some value to satisfy the terms of the charge.

*Bodkin* (with whom was *Cooper* for the prosecution.)—It is not necessary that the property should be alleged to be in any one. The gist of the charge is not the obtaining, but the demanding and endeavouring to obtain, by threats. It is not necessary that anything at all should have been obtained. It is like a case of breaking

into a house in the night time with intent to steal, where it is quite immaterial whether anything is stolen or not. In such a case, where the goods of a particular person were alleged to have been stolen, it was held not necessary to prove that they were his goods: (*R. v. Clarke*, 1 C. & K. 421.)

*Parnell*.—The same thing might have been urged in the case of *R. v. Parker*. There it was quite immaterial whether anything was obtained or not. The conspiracy was the gist of the offence, and yet it was held that a conspiracy to obtain goods by false pretences must state whose property the goods were.

PLATT, B., took time to consider the objections, and on the next day delivered the following judgment:—The indictment charges the prisoners with making certain threats, with intent to extort from the prosecutor a valuable security; but it does not state whose property that security was, and the question is whether or not the omission is fatal to its validity. The statute on which the indictment is framed is the 10 & 11 Vict. c. 66, s. 2, which makes it an offence to accuse or threaten to accuse any person of the offence specified, with a view or intent to extort or gain from such person any property, money, or security. The words of the statute are exceedingly important, because one of them, namely, "extort," has a certain technical meaning, which is defined in 2 Salk., and when a man is charged with extorsively taking, the very import of the word shows that he is not acquiring possession of his own. The ordinary form of indictment for extortion may be found in Burn's Justice, and the language there shows that it is not at all necessary that the thing extorted should be said to be the property of any person. In *R. v. Norton*, the indictment was held bad for want of such an averment; but that was an indictment under another statute, which made it necessary that the party charged under it should actually obtain the thing sought to be obtained; but that is not so here, because, whether anything is obtained or not, the crime is complete, and, therefore, whether the property belongs to the person threatened or not, is quite immaterial, the offence is committed immediately the accusation is made, with the evil intent stated in the indictment.

*Bodkin* and *Cooper* for the prosecution.

*Parnell*, *Woollett*, and *Prendergast* for the prisoners.

*Verdict, Guilty.*

REG.  
v.  
TIDDEMAN,  
BENNETT,  
AND OTHERS.

1850.

Threatening to  
accuse—  
Indictment.

Judgment.

## CENTRAL CRIMINAL COURT.

APRIL SESSION.

July 9, 1850.

(Before the RECORDER.)

REG. v. BAILEY AND OTHERS.

8 & 9 Vict. c. 109, s. 17—*Gaming—False pretences.**Upon a prosecution under the 8 & 9 Vict. c. 109, s. 17, for obtaining money by fraudulently playing at a certain game:**Held that there must be fraud, unlawful device, or ill practice during the game, and it is not sufficient that fraud was resorted to to induce the prosecutor to play.**Quære, whether skittles is a game within the above statute?**Where several persons confederated and combined together to play at skittles so that the play of one of them should betoken his skill to be much less than it really was, in order that the prosecutor (a looker-on) might be induced to play with him, and thereby lose to him his money: Held, an indictable conspiracy.***T**HE defendants were arraigned upon the following indictment:—

Indictment.

Central Criminal Court, } The jurors for our Lady the Queen,  
to wit. } upon their oath present, that, heretofore and before the committing of the offence hereinafter in this count mentioned, to wit, on the 3rd day of April, A.D. 1850, one Joseph Bailey, being a person of great skill and dexterity in playing games with skittles, had played and lost divers of the said games in the presence and view as well of one Thomas Bland, as of John Lawler and John Johnson, hereinafter mentioned, and the said Joseph Bailey then paid to the said John Lawler and John Johnson divers sums of money as and for wagers staked by him the said Joseph Bailey, upon the result of the said games, and as lost by him through his want of skill in playing the said games.

Whereas in truth and in fact the said games were intentionally lost by him the said Joseph Bailey, and not from any want of skill on the part of the said Joseph Bailey; and the said wagers, as and for which the said moneys were so paid as aforesaid, were pretended and non-existing wagers, and the said moneys were so paid as aforesaid for the purpose of causing it to appear that such supposed wagers had existence, which, in fact, they had not, and for no other purpose whatever. And the jurors aforesaid, upon their

First count.

oath aforesaid, do further present that the said Joseph Bailey, late of the parish of Saint James, Clerkenwell, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, labourer, John Lawler, late of the same place, labourer, and John Johnson, late of the same place, labourer, being evil-disposed persons, and intending to cheat and defraud the said Thomas Bland of his moneys, afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully did conspire, combine, confederate and agree together to deceive the said Thomas Bland, and falsely to represent and cause it to appear to, and be believed by, the said Thomas Bland, that the said sums of money so paid as aforesaid were wagers which had been lost by the said Joseph Bailey to them the said John Lawler and John Johnson, owing to the want of skill of the said Joseph Bailey in playing the said games so played by him as aforesaid; that the said Joseph Bailey was, in fact, an unskilful player at the said games, and to induce and persuade the said Thomas Bland, upon the faith and assurance of the said Joseph Bailey having lost the said wagers, from being an unskilful player at the said games, to wager with the said Joseph Bailey, upon the issue of divers other of the said games then and there to be played by the said Joseph Bailey, divers sums of money, to be paid by the said Joseph Bailey to the said Thomas Bland, in the event of the said Joseph Bailey losing the said last-mentioned games; and to be paid by the said Thomas Bland to the said Joseph Bailey, in the event of the said Joseph Bailey winning the said games, that he the said Joseph Bailey, being a person well skilled as aforesaid, should win the said games so to be played as aforesaid, and thereupon fraudulently, wrongfully, deceitfully, and injuriously to induce, persuade and compel the said Thomas Bland to pay divers of his moneys to the said Joseph Bailey, as and for wagers fairly lost upon the said games so to be played as aforesaid, and to cheat and defraud the said Thomas Bland of the same; and, further, that they the said Joseph Bailey, John Lawler, and John Johnson should mutually aid and assist one another in carrying out and perfecting the said conspiracy, combination, confederacy and agreement. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Joseph Bailey, John Lawler, and John Johnson, in pursuance and in prosecution of the said conspiracy, combination, confederacy and agreement, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did induce and persuade the said Thomas Bland, upon the faith of the said Joseph Bailey having lost the said wagers from being an unskilful player, to play at the said games with the said Joseph Bailey; and the said Thomas Bland did then wager with the said Joseph Bailey divers sums of money, to be paid by the said Joseph Bailey to the said Thomas Bland, in the event of the said Joseph Bailey losing certain games at skittles, then agreed to be played by the

REG.  
v.  
BAILEY  
AND OTHERS.  
—  
1850.

8 & 9 Vict.  
c. 109, s. 17—  
*Gaming—False  
pretences.*

Indictment.

REG.  
v.  
BAILEY  
AND OTHERS.

1850.

8 & 9 Vict.  
c. 109, s. 17—  
*Gaming—False  
pretences.*

Indictment.

Second count.

said Joseph Bailey, and to be paid by the said Thomas Bland to the said Joseph Bailey, in the event of the said Joseph Bailey winning the said games; and the said Joseph Bailey, in concert and fraudulent collusion with the said John Lawler and John Johnson, did then and there play and win the said games so agreed to be played as last aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Joseph Bailey, John Lawler, and John Johnson, in pursuance and in further prosecution of the said conspiracy, combination, confederacy and agreement did thereupon afterwards, to wit, on the day and year aforesaid, fraudulently, wrongfully, deceitfully and injuriously induce, persuade and compel the said Thomas Bland to bring to the said Joseph Bailey divers of the moneys of the said Thomas Bland, to wit, to the amount of 70*l.* and upwards, as and for wagers fairly lost by him the said Thomas Bland to the said Joseph Bailey, upon the event of the said last-mentioned games, which said last-mentioned moneys they, the said Joseph Bailey, John Lawler, and John Johnson, in furtherance and in pursuance of the said conspiracy, combination, confederacy and agreement, did then and there convert to their own use, ends and purposes, and wrongfully, fraudulently and injuriously did cheat and defraud the said Thomas Bland of the same, to the great injury and deception of the said Thomas Bland, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

*Second Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Joseph Bailey, John Lawler, and John Johnson, being evil disposed persons, and intending and wickedly devising to cheat and defraud the said Thomas Bland of his moneys, afterwards, to wit, on the same day and in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully and wickedly did conspire, combine, confederate and agree together, that the said Joseph Bailey should play divers games at skittles in the view and presence of the said Thomas Bland; that the said Joseph Bailey, intentionally, and from no want of skill in playing the said games, should lose the said games, and should play the same in a manner indicating want of skill in playing the same, that thereupon the said Joseph Bailey should pay to them the said John Lawler and John Johnson, and that they should receive from the said Joseph Bailey, divers sums of money as and for certain wagers by them the said Joseph Bailey, John Lawler, and John Johnson falsely to be pretended to have been depending upon the result of the said games, and to have been fairly lost by the said Joseph Bailey to the said John Lawler and John Johnson; that by the several means in this count aforesaid, they, the said Joseph Bailey, John Lawler and John Johnson, should deceive the said Thomas Bland, and should falsely represent and cause it to appear to, and be believed by, the said Thomas Bland, that the said sums of money so to be paid as aforesaid were wagers which had

been lost by the said Joseph Bailey to them the said John Lawler and John Johnson owing to the want of skill of the said Joseph Bailey in playing such games, and from no other cause whatsoever, and that the said Joseph Bailey, who was in fact a very skilful and dexterous player at such games, then was a very unskilful player thereat, and thereupon fraudulently and deceitfully to induce and persuade the said Thomas Bland, upon the faith and assurance of the said Joseph Bailey having lost such wagers, from being an unskilful player at such games, and from no other cause, to wager with the said Joseph Bailey as an unskilful player at such games, upon the issue of divers other games at skittles then and there to be played by the said Joseph Bailey, divers sums of money to be paid by the said Joseph Bailey to the said Thomas Bland, in the event of the said Joseph Bailey losing such last-mentioned games, and to be paid by the said Thomas Bland to the said Joseph Bailey in the event of the said Joseph Bailey losing such games: that he, the said Joseph Bailey, being in fact a person well skilled in playing such games, should win such games so to be played as aforesaid; that thereupon they the said Joseph Bailey, John Lawler, and John Johnson should fraudulently, wrongfully, deceitfully and injuriously induce, persuade and compel the said Thomas Bland to pay divers of his moneys to the said Joseph Bailey as and for wagers fairly lost upon such games so to be played as aforesaid, and to cheat and defraud the said Thomas Bland of his said moneys. And further, that they the said Joseph Bailey, John Lawler, and John Johnson, should mutually aid and assist one another in carrying out, perfecting and accomplishing the said conspiracy, combination, confederacy and agreement, to the great injury and deception of the said Thomas Bland, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown, and dignity.

*Third Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Joseph Bailey, John Lawler, and John Johnson being evil-disposed persons, and wickedly devising and intending to cheat and defraud the said Thomas Bland, afterwards, to wit, on the day and year aforesaid, with force and arms at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully and wickedly did conspire, combine, confederate and agree together, and with divers other evil-disposed persons, whose names to the jurors aforesaid are as yet unknown, by divers false pretences, and by divers unlawful, subtle, fraudulent, indirect and deceitful means, ways, contrivances, stratagems and devices, to obtain and acquire to themselves, of and from the said Thomas Bland, divers of the moneys of the said Thomas Bland, to wit, to the amount of 100*l.*, and to cheat and defraud him of the same, to the great injury and deception of the said Thomas Bland, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

*Fourth Count.*—And the jurors aforesaid, upon their oath afore- Fourth count.

REG.  
v.  
BAILEY  
AND OTHERS.

1850.

8 & 9 Vict.  
c. 109, s. 17—  
*Gaming—False  
pretences.*

Indictment.

Third count.



REG.  
v.  
BAILLY  
AND OTHERS.

1850.

8 & 9 Vict.  
c. 109, s. 17—  
*Gaming—False  
pretences.*

said, do further present that the said Joseph Bailey, John Lawler, and John Johnson, being evil-disposed persons, afterwards, to wit, on the day and year aforesaid, with force and arms at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully and wickedly did conspire, combine, confederate and agree together, and with divers other evil-disposed persons, whose names to the jurors aforesaid are as yet unknown, by divers unlawful, subtle, fraudulent, indirect and deceitful ways, means, contrivances, stratagems and devices to prejudice, injure and impoverish the said Thomas Bland; to the great injury of the said Thomas Bland, to the evil and pernicious example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

Fifth count.

*Fifth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that heretofore and before the committing of the offence hereinafter in this count mentioned, to wit, on the said 30th day of April, A. D., 1850, the said Joseph Bailey, in the presence and view, as well of the said Thomas Bland as of the said John Lawler and John Johnson, had played and lost divers games with skittles, and had thereupon paid to the said John Lawler and John Johnson, and the said John Lawler and John Johnson then received from the said Joseph Bailey, divers sums of money as and for wagers staked by the said Joseph Bailey upon the issue of the said last-mentioned games, and by him lost to the said John Lawler and John Johnson. And the jurors aforesaid, upon their oath aforesaid, do further present that thereupon, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, the said Joseph Bailey, John Lawler, and John Johnson requested the said Thomas Bland to wager with the said Joseph Bailey, and the said Thomas Bland did upon such request wager with the said Joseph Bailey a certain sum of money, to wit, the sum of 5*l*. to be paid by the said Thomas Bland to the said Joseph Bailey, in the event of the said Joseph Bailey winning a certain other game then agreed by the said Joseph Bailey to be played with skittles, and to be paid by the said Joseph Bailey to the said Thomas Bland in the event of the said Joseph Bailey losing the said last-mentioned game. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Joseph Bailey thereupon afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, did play the said last-mentioned game of skittles with a skill and dexterity far exceeding the skill and dexterity with which he had played the said games so lost by him as aforesaid, and then and there won the said game upon which the said wager between the said Joseph Bailey and Thomas Bland was depending as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Joseph Bailey did thereupon then and there demand of and from the said Thomas Bland the said last-mentioned wager. And the jurors aforesaid upon

Indictment.

their oath aforesaid, do further present that the said Joseph Bailey, John Lawler, and John Johnson, being evil-disposed persons and intending to cheat and defraud the said Thomas Bland of his moneys, and falsely to make it to appear to the said Thomas Bland that the said wager had been fairly lost by the said Thomas Bland, when in truth and in fact the same had not been fairly lost nor was the same justly payable by the said Thomas Bland thereupon, then and there, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly and designedly did falsely pretend to the said Thomas Bland that the said games so played and lost by the said Joseph Bailey as aforesaid, had not been intentionally lost by the said Joseph Bailey, and that those games had been played by the said Joseph Bailey to the best of the ability of the said Joseph Bailey, that the difference in skill with which those games and the said game upon which the said Thomas Bland so wagered as aforesaid had been played was accidental, and not from any want of exertion on the part of the said Joseph Bailey in playing the said games so lost by him as aforesaid, and that the said sums of money so paid by the said Joseph Bailey as aforesaid were so paid, as aforesaid, for and in respect of wagers really and in fact laid and made with the said John Lawler and John Johnson, by means of which said false pretences the said Joseph Bailey, John Lawler, and John Johnson, did then and there unlawfully, knowingly and designedly, fraudulently obtain of and from the said Thomas Bland one bank note for the payment and of the value of five pounds, one piece of the current gold coin of this realm, called a sovereign, two pieces of the current gold coin of this realm, called half-sovereigns, four pieces of the current silver coin of this realm, called crowns, four pieces of the current silver coin of this realm, called half-crowns, ten pieces of the current silver coin of this realm, called shillings, twenty pieces of the current silver coin of this realm, called sixpences, fifteen pieces of the current silver coin of this realm, called groats, thirty-six pieces of the current copper coin of this realm, called pence, and twenty-four pieces of the current copper coin of this realm, called halfpence, and divers, to wit, 500 other pieces of the current coin of this realm, amounting in value to a large sum, to wit, to the sum of 5*l.*, the denomination whereof respectively is to the jurors aforesaid unknown, of the moneys and property of the said Thomas Bland, with intent to cheat and defraud him thereof, whereas, in truth and in fact, the said games so played and lost by the said Joseph Bailey, as in this count aforesaid, had been intentionally lost by him; and whereas, in truth and in fact, the said games had not, nor had any of them, been played to the best of the ability of the said Joseph Bailey, and whereas, in truth and in fact, the difference in skill with which those games and the said game upon which the said Thomas Bland so wagered, as in this count aforesaid, had been played, was not accidental, but from want of exertion and by design on the part of the said Joseph Bailey in playing the said

REG.  
v.  
BAILLY  
AND OTHERS.

1850.

8 & 9 Vict.  
c. 109, s. 17—  
*Gaming—False  
pretences.*

Indictment.

REG.  
v.  
BAILEY  
AND OTHERS.

1850.

8 & 9 Vict.  
c. 109, s. 17—  
*Gaming—False  
pretences.*

Indictment.

Evidence.

games so lost by him, as in this count aforesaid; and whereas, in truth and in fact, the said sums of money so paid by the said Joseph Bailey, as in this count aforesaid, were not paid for and in respect of wagers really and in fact laid and made with the said John Lawler and John Johnson; and whereas, in truth and in fact, the said games so played and lost by the said Joseph Bailey as aforesaid were designedly played by the said Joseph Bailey with pretended want of skill, in collusion with the said John Lawler and John Johnson, for the purpose of deceiving the said Thomas Bland, and inducing him to lay and make the said wager with the said Joseph Bailey as an unskilful player at the said games, when, in truth and in fact, he was a very skilful and dexterous player thereat, and for no other purpose whatsoever, as they the said John Lawler and John Johnson then and there well knew. And whereas, in truth and in fact, the said sums of money were paid as aforesaid, as and for wagers as aforesaid, for the purpose of cheating, deceiving and defrauding the said Thomas Bland, and for no other purpose whatsoever, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

It appeared in evidence that the prosecutor met the prisoners at a public-house, when the latter commenced playing at skittles, &c. The defendant Bailey appeared to be very drunk, and played so badly that he lost every game. The other defendants then persuaded the prosecutor to play against Bailey, and stake large sums upon the game, for that he was sure to win everything he played for. The prosecutor accordingly did play with Bailey several games for large sums, every one of which he lost. As soon as the defendants had got possession of all the prosecutor's money, they made some excuse for leaving the skittle ground and ran away.

*Parry and Parnell* (for the defendants), submitted that the 5th count could not be sustained. It was drawn under the statute 8 & 9 Vict. c. 109, s. 17, which was in these words:—"Every person who shall by any fraud or unlawful device, or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers or adventures, or in betting on the sides or hands of them that do play, or on wagering on the event of any game, sport, pastime or exercise, win from any other person to himself, or any other, or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same." The first question would be, whether skittles was a game within the statutes. The indictment was drawn with reference to the first part of the section, which referred to cards, dice, tables or other games; and, in construing the meaning of the words other games, the doctrine as to things *ejusdem generis* must be applied, and it was clear that skittles could not be said to be *ejusdem generis* with cards, dice, tables, &c. These were all games of chance, and "other games" were probably intended to be confined to games of chance; for, in

the latter portion of the same section, we find game, sports, pastime, or exercise, within one or the other of which terms skittles would seem much more reasonably included. 2ndly. There was no such fraud shown either in the indictment or by the evidence, as would bring the case within the 5th section. There must be fraud in the act of playing, which it was not suggested was the case here. If there was any fraud at all, it was before the actual play commenced; it was in concealing the fact that Bailey possessed the skill he really had. But for what passed previously, it could not be said that there was anything unfair in the game, for Bailey won by skill, and not by any trick or artifice whatever. The statute merely referred to cases where marked cards or false dice were used, or where cards or dice were changed during the progress of the game. That would be cheating at the game itself.

The RECORDER.—But what do you say to the counts for conspiracy?

*Parry* submitted that, upon the evidence, they could not be supported. At the very utmost, it was a struggle between the prosecutor and the defendants which party should take advantage of the other. It was clearly in the contemplation of the prosecutor to make a profit of the inebriety of Bailey, whom he looked upon as an easy victim.

*Clarkson* and *Robinson* (for the prosecution.)—The 5th count is supported by the facts proved. The extra skill with which the game was played was a fraud on the part of the player, if he had before led the prosecutor to believe that he played indifferently. The act uses the word unlawful device, and surely the playing the game was part of the unlawful device by which the prosecutor's money was obtained. At all events, the counts for conspiracy are made out. It may be that if one man alone has resorted to this species of deception, it might not have been an indictable offence; but it is very different where two or more combine and support each other in the misrepresentation.

The RECORDER.—I do not think that the 5th count can be sustained. The act, being a penal one, must be strictly construed, and I think that the fraud relied on must be a fraud put in practice during the game itself. Here it was not so: the fraud appears to consist in the previous misrepresentation of Bailey's skill. But I am clearly of opinion that the counts for conspiracy are made out if the jury believe the witnesses. In many cases in which an attempt is made by one man to overreach another, the law does not interfere. Where it is a mere struggle between mind and mind, caution and wariness, if fairly exercised, may often be held sufficient to obviate the effects of cunning and duplicity. But when several combine for the purpose of aiding and assisting each other in outwitting a single individual, there the parties stand on very different terms, and that which ordinary prudence might otherwise prevent, becomes oftentimes a dangerous and powerful conspiracy, difficult to be detected, and most disastrous in its consequences. If the jury believe that the three defendants did conspire together that Bailey

REG.  
C.  
BAILRY  
AND OTHERS.

1850.

8 & 9 Vict.  
c. 109, s. 17—  
*Gaming—False  
pretences.*

REG.  
v.  
BAILEY  
AND OTHERS.  
—  
1850.

8 & 9 Vict.  
c. 109, s. 17—  
*Gaming—False  
pretences.*

should play badly, in order that the prosecutor might be induced to play with him, and that then, when he did play, Bailey should use the skill he possessed, and which he had purposely concealed in order to get into their possession the prosecutor's money, then I think they must find them guilty of conspiracy.

*Guilty of conspiracy.*

*Clarkson and Robinson for the prosecution.  
Parry and Parnell for the prisoners.*

## CENTRAL CRIMINAL COURT.

JULY SESSION, 1850.

July 10.

(Before PATTESON, J., and TALFOURD, J.)

REG. v. O'BRIEN.(a)

### *Burglary—Entry—Intent.*

*On an indictment for burglary, where any part of the person of the prisoner is within the dwelling-house, no matter with what immediate intent, there is a sufficient entry to constitute the offence, and therefore, where the hand was proved to have been inside the house, it was held immaterial whether it was there for the purpose of lifting up a window, or of abstracting property. But where no part of the prisoner's body is inside the premises, but he introduces an instrument within it for the mere purpose of effecting an entry, and not with any other object, semble, the entry is not complete.*

THE prisoner was indicted for burglary. Evidence was given that the prisoner had lifted up the sash of a window, and that for the purpose of doing so his hand was within the room of the dwelling-house: there was no further proof of entry.

O'Brien (for the prisoner) contended that if the hand was there for the mere purpose of opening the sash, that there was no sufficient entry proved.

TALFOURD, J.—We have been looking into the authorities, and it seems sufficient if the hand, or any part of the person, is within the house for any purpose.

PATTESON, J.—Where an instrument is used, the law appears to be different; there the instrument must be within the premises, not only for the purpose of making an entry, but also for the purpose of effecting the contemplated felony, as where a hook is

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

introduced for the purpose of taking away goods, or a pistol put in for the purpose of killing the inmates of the house, there the entry is sufficient; but if the instrument is merely used for the purpose of making an entry, then the proof of the entry fails. We think there is sufficient evidence here, and the case must go to the jury.

*Not guilty.*

*O'Brien* for the prisoner.

REG.  
v.  
O'BRIEN.  
1850.  
Burglary—  
Evidence.

## CENTRAL CRIMINAL COURT.

JULY SESSION, 1850.

July 12.

(Before BARON ALDERSON.)

REG. v. DONOVAN.(a)

*Attempt to murder—Intent.*

*Where a woman jumps out of a window for the purpose of avoiding the violence of her husband, and sustains dangerous bodily injury : Held, that the husband cannot be convicted of an attempt to murder, unless he intended by his conduct to make her jump out of the window.*

**T**HE prisoner was indicted for causing a bodily injury, dangerous to the life of Ann Donovan, by then and there feloniously casting, throwing and forcing with both his hands the said Ann Donovan upon the front part of her head, from and out of a certain window, there, down, upon, and against the ground, with intent to kill and murder the said Ann Donovan.

There were other counts in the indictment.

The prosecutrix, being examined, stated, that she fell out of the window accidentally; that the prisoner beat her with his fists, and was about to inflict other injuries upon her, when she went to the window to call for assistance and fell out of it on to the ground.

*Bodkin*, in opening the case for the prosecution, had said that the evidence would no doubt be conflicting as to whether the woman was thrown out or jumped out of the window, but that was immaterial, for if the prisoner by his violence compelled her to throw herself out, they must find him guilty on the first count.

ALDERSON, B.—I do not think it will be sufficient to prove that she jumped from the window to escape from his violence.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

REG.  
v.  
DONOVAN.  
—  
1850.  
—  
Attempt to  
murder.

You must go further than that, and satisfy the jury that he intended at the time to make her jump out.

The case was left to the jury, who found the prisoner

*Guilty.*

*Bodkin* for the prosecution.

## CENTRAL CRIMINAL COURT.

AUGUST SESSION, 1850.

*August 23.*

(Before BARON PLATT.)

REG. v. ROOK.(a)

*Murder—Assault—7 Will. 4 & 1 Vict. c. 85, s. 11.*

*On an indictment for murder, evidence was given of long-continued violence and ill-treatment of the deceased by the prisoner, but the evidence of the surgeon went to prove that the cause of death was inflammation of the lungs, and that it was quite unconnected with the prisoner's conduct. Held, that the prisoner might be convicted of a common assault.*

THE prisoner was indicted for the wilful murder of Elizabeth Wallis. In the eighteenth count the death was laid to be by beating. The evidence showed that, for a considerable time, and nearly up to the period of the death, the prisoner, who was the mother of the deceased, had treated her with great violence and brutality, but, on the surgeon being examined, he gave it as his opinion that the cause of death was inflammation of the lungs, and that he saw no bruises or marks upon the body which, in his judgment, could have in any way contributed to a fatal result.

*Parry* (for the prisoner), submitted there was no evidence to go to the jury. It was negatived that what had been proved against the prisoner had in any way contributed to the death, and he must, therefore, be acquitted.

*Clarkson* (for the prosecution), contended that, at all events, the jury might convict of an assault. The indictment clearly pointed to violence as the cause of death, and it was to that that the evidence was directed. It therefore contained the very charge of assault upon which the jury might be directed to convict.

*Parry* observed that this very question was now awaiting the decision of the judges of the Court of Criminal Appeal, in the case

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

of *Reg. v. Bird and Wife*, who were tried on the Western Circuit, at the last Spring Assizes, before Mr. Justice Talfourd. On the indictment against them for murder, that learned judge held that they could not be convicted of an assault under circumstances not dissimilar from the present. A separate indictment was afterwards preferred against them for an assault, and they pleaded *autrefois acquit*, and the question was therefore raised, whether they could have been convicted of an assault on the former indictment. In *R. v. Crumpton* (C. & M. 597), Patteson, J. said: "To convict a person of an assault under the 1 Vict. c. 85, s. 11, it must be an assault which is the subject-matter of the charge, and which is embodied in the felony charged, and which, but for circumstances, would be felony. I think that no assault is included in a charge of manslaughter which does not conduce to the death of the deceased, although the death itself be not manslaughter. Here the surgeon disconnects the assault from the death, and therefore I think that the prisoner is entitled to be acquitted altogether." So in *R. v. Connor* (2 C. & K. 518), on the Northern Circuit, Mr. Serjt. Murphy, after consulting Pollock, C.B., held that a prisoner under similar circumstances, could not be convicted of an assault.

PLATT, B.—I am quite clearly of opinion that the prisoner may be convicted of an assault. It is true that the assault must not be entirely independent of the specific offence charged, but here it is part of that offence. The prisoner is charged with causing death by beating. The beating is proved to have occurred up to a very short period of the death, and although it is shown now that such treatment was not the actual cause of death, surely it cannot be said that the blows did not form part of the original charge. It seems precisely the sort of case that the statute was intended to meet, and I shall direct the jury, therefore, that if they believe the witnesses, they may find the prisoner guilty of an assault.

*Verdict, Guilty of assault.*

*Clarkson* for the prosecution.

*Parry* for the prisoner.

REG. v. BOOK.

1850.

Assault—

1 Vict. c. 85,  
s. 11.



## CENTRAL CRIMINAL COURT.

SEPTEMBER SESSION, 1850.

*September 18.*

(Before Mr. JUSTICE WILLIAMS.)

REG. v. BRAYNELL AND WREN.(a)

7 & 8 Geo. 4, c. 29, s. 8—*Threatening to accuse of an infamous crime—Evidence—Admissibility of depositions.*

*On a charge of threatening to accuse of an infamous crime, it appeared that the prisoners had made a charge before a magistrate against the prosecutor of endeavouring to excite one of them to the commission of an unnatural offence.*

*Held, that the depositions of the prisoners upon that occasion were admissible in evidence against them.*

*When before the magistrate the prisoners were separately cross-examined as to their being together on the day when the offence was alleged to have been committed, how they had been occupied, &c., and their answers were so contradictory in themselves and so inconsistent with each other that the magistrate dismissed the charge against the then defendant, and bound him over to prosecute the prisoners for endeavouring to extort money by threats.*

*Held, that the answers elicited on such cross-examination were not admissible.*

*Under such circumstances, the judge will look at the depositions before they are read in court, in order that he may decide upon the materiality or non-materiality of the evidence.*

*Where the charge made by the prisoners was one specifically of an indecent assault:*

*Held, that it was for the jury to take into their consideration, not only the charge itself, but the conduct of the prisoners generally, for the purpose of deciding what was the nature of the accusation they intended to prefer.*

THE prisoners were indicted for that they, on the 20th August, at St. James's, Westminster, feloniously did threaten one M. T. to accuse him of a certain infamous crime, to wit, of having assaulted him, the said Joseph Braynell, with intent to commit the abominable crime of b——y with the said J. Braynell, with a view, and with the intent in so doing, thereby, then and there to extort and gain money from him the said M. T.

The 2nd count charged them with having threatened the said M. T. to accuse him of a certain infamous crime, to wit, of having attempted and endeavoured to commit the abominable crime, &c.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

The 3rd count alleged that they threatened the said M. T. to accuse him of a certain infamous crime, to wit, of the crime of having offered and made to the said Joseph Braynell a certain solicitation and persuasion whereby to move and induce the said Joseph Braynell to commit with the said M. T. the abominable crime, &c.

REG.  
v.  
BRAYNELL AND  
WREN.  
—  
1850.

The 4th count alleged that they threatened the said M. T. to accuse him of a certain infamous crime, to wit, of the crime of having offered and made to the said J. Braynell a certain solicitation and persuasion whereby to move and induce the said Joseph Braynell to permit him, the said M. T., to commit with him, the said Joseph Braynell, the abominable crime, &c.

*Threatening to  
accuse of  
infamous crime  
—Evidence—  
Practice.*

There were four other counts, which charged that the prisoners "did accuse," instead of that they "threatened to accuse," and the 9th and last count was for feloniously demanding money, with menaces, from M. T., with intent to steal the same.

It appeared in evidence that the prosecutor, who was between 70 and 80 years of age, was looking in at a shop window on the evening in question when he felt some person press against him, and looking over his shoulder, as though for the purpose of also seeing what was going on in the shop. The prosecutor turned round, and saw the prisoner Braynell. In a moment afterwards he felt that the latter was pressing his private parts against his (the prosecutor's) hand. He immediately walked away, when the prisoner followed him, and asked him what he meant by taking indecent liberties with him. Wren was then present. The prosecutor denied that he had done what was alleged, and Braynell said, "Do you think I will allow you to do that for nothing?" He then asked what the prosecutor would stand, and suggested that they should go into some public-house to settle it. The prosecutor refused to do so, when Braynell told him he must take the consequences. Shortly afterwards a policeman coming up, the prisoners gave the prosecutor into custody. He was taken to the station-house, and the charge was made by Braynell, who signed the charged sheet. It was in these terms—"Indecently assaulting Joseph Braynell at Hemming's-row, St. Martin's-in-the-Fields." Wren signed it as a witness. The next day the prosecutor was taken before a magistrate, when the charge was gone into, the prisoners being examined as witnesses. After giving their evidence in chief, they were subjected to a searching cross-examination by the magistrate, each in the absence of the other, and the result was that the charge against the prosecutor was dismissed, and he was bound over to prosecute the prisoners on the present charge.

The deposition of Braynell, containing his evidence on the charge before the magistrate, having been put in and read—

*Clarkson and Ballantine* (for the prosecution), proposed to read the cross-examination of the same prisoner, which had been returned as part of the depositions.

*Robinson* (for the prisoner Braynell), contended that this could not be done. He had no desire to shut out the statement volun-

REG.  
v.  
BRAYNELL AND  
WREN.  
—  
1850.

*Threatening to  
accuse of  
infamous crime  
—Evidence—  
Practice.*

tarily made by the prisoner, but the prosecution were not entitled to read statements that had been extorted from him, probably with a view of putting him upon his trial on this charge. He could not object to what was relevant to this inquiry, but the magistrate, in the exercise of his discretion, might have chosen to ask many questions which would readily suggest themselves to the learned judge, the answers to which could have no relevancy here.

*Ballantine* contended that whatever was stated by the prisoner before the magistrate was evidence, whether voluntarily detailed by him in the first instance or elicited by questions put by the magistrate. The effect of the evidence was one thing—its admissibility was another. If a statement made was substantially material, it could not be dismembered—one part submitted to a jury and another withheld; otherwise a very erroneous view of the effect of the part admitted might be formed. It was surely most material to inquire into the truth of the charge made by the prisoner, and to judge of the truth, the whole statement must be taken together. The prisoner came forward voluntarily to make a charge, and he ought not to complain that matter elicited from him in the process of testing its truth was now used against him. But at present the question was not raised whether the evidence was admissible or not, for it was not yet before the court, and until it was read there was no means of ascertaining whether or not it was relevant to the inquiry.

*WILLIAMS, J.*—How can I decide as to whether this is or is not material, until it is put in evidence? At present I am quite ignorant of its nature.

*Robinson* suggested that the fair course as regarded the prisoner would be for his lordship to look at the deposition, and if he decided that it was material to the then investigation, of course no further objection could be made; but his argument was based on the assumption that it was totally irrelevant, and until shown to be otherwise, it would be unjust to the prisoner that it should be read. It was not to be permitted to counsel for the prosecution to put in a mass of evidence, relevant as well as irrelevant, to the inquiry, and when an impression had been made upon the jury, leave it to be subsequently determined what they were to receive as legal evidence, and what to reject. The cross-examination might be very material in enabling the magistrate to decide upon the question before him, but still might have no bearing on the issue to be determined here.

*WILLIAMS, J.*—I think the proper course for me to adopt is to look at the matter in dispute, and form my judgment upon it before it is put in. The fact of the statement being made at the same time as the original charge, does not necessarily make it admissible.

The cross-examination was principally directed to ascertain how the prisoner had employed himself, and whether he and *Wren* had been together during the day in question, and his answers were not only contradictory in themselves, but were quite inconsistent

with those of the other prisoner, when he was afterwards cross-examined.

WILLIAMS, J. (after reading the deposition)—I do not see how this can be made evidence. It was no doubt most material that these questions should have been asked before the magistrate, because it was most important to ascertain the amount of credit to be attached to the evidence of the prisoner, but I cannot perceive any such connexion between these answers and the particular charge in this indictment as would justify me in saying that they are relevant here.

The reading of the examination of Wren before the magistrate was then objected to by

*Woollett*, who appeared for him.—The statement was not made voluntarily, as all confessions must be, and it was only in the light of a confession that it could be contended it was admissible. The prisoner was examined upon oath, and there were several cases which decided that this would prevent a statement, otherwise admissible, from being received. *R. v. Lewis* (6 C. & P. 167), *R. v. Davis* (6 C. & P. 177), were to this effect. If the prisoner had refused to give evidence, he might have been committed by the magistrate, so that there was a species of compulsion on him to give his testimony.

*Ballantine* said, no doubt, if a person had been examined as a witness, and was afterwards committed to take his trial for the offence, to prove which he had previously been called, his evidence might be inadmissible; but where the charge was a different one, the same rule did not hold. Here, not only was the position of the parties different, but the offence was of a totally different nature. Where a statement made by a prisoner upon oath, at a time when he was not under suspicion, was tendered in evidence against him on a subsequent occasion, it was admitted: (*R. v. Tubby* 5 C. & P. 530.)

WILLIAMS, J.—I am clearly of opinion that this evidence is admissible. When given, the prisoner was under no charge, nor was he bound to make any statement that might criminate himself.

At the conclusion of the case for the prosecution,

*Robinson* and *Woollett* submitted that the evidence was insufficient to support the first eight counts of the indictment. The charge was that these prisoners had threatened to accuse the prosecutor of an attempt to commit an infamous crime; but the evidence showed that the charge was to accuse him of an attempt to commit an indecent assault. The statute 7 & 8 Geo. 4, c. 29, s. 9, contained an express definition of an infamous crime, and an indecent assault was not included therein. In *R. v. Middleditch* (2 Cox's Crim. Cas. 313), the question was raised, and the opinion of the judges taken, and they held that under such circumstances as the present a prisoner could not be convicted.

*Clarkson*.—There the precise question was not left to the jury. But in *R. v. Cooper* (3 Cox's Crim. Cas. 547), the same point was

REG.  
v.  
BRAYNELL AND  
WREN.  
—  
1850.  
—  
*Threatening to  
accuse of  
infamous crime  
—Evidence—  
Practice.*

REG.  
v.  
BRAYNELL AND  
WREN.  
—  
1850.  
—

taken, and it was held by Mr. Justice Cresswell that it was a question for the jury to decide.

WILLIAMS, J.—It is not for me to determine what the prisoner's intent was in making the charge. The jury have heard the evidence, and it is for them to say, judging from the prisoners' whole conduct, what was the accusation they intended to make.

*The prisoners were convicted.*

*Clarkson and Ballantine for the prosecution.*

*Robinson and Woollett for the prisoners.*

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## CENTRAL CRIMINAL COURT.

SEPTEMBER SESSION, 1850.

*September 20.*

(Before Mr. JUSTICE TALFOURD.)

REG. v. BENTLEY.(a)

*Cutting and wounding, with intent to resist lawful apprehension—Intent. On a prosecution for cutting and wounding, with intent to resist lawful apprehension, it is sufficient to show that the apprehension was in fact lawful. It is quite immaterial that the prisoner had no reason to believe that it was so.*

THE prisoner was indicted for cutting and wounding with intent to resist his lawful apprehension: the evidence showed that the prosecutor, a police constable, went with a brother officer, both being in plain clothes, and with two other policemen in uniform, to a public-house, and told the prisoner that he wanted him on a charge of highway robbery. He had no warrant, but from information he had received, he thought it his duty to apprehend the prisoner. The latter asked him for further information relative to the charge, which he refused to give, and the prisoner then told him that he would not go to the station-house, unless he was told why, or by what authority, he was apprehended. On the witness immediately proceeding to arrest him, the prisoner violently assaulted and seriously injured him.

*Robinson* (for the prisoner) contended that, upon this evidence, the prisoner could not be convicted of the crime alleged against him. The very nature of the charge tended to show that the

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

accused must be aware at the time that the apprehension was lawful, but here there was nothing to show that fact. The policeman had no warrant: he stated none of the circumstances of suspicion by which possibly he might have been justified in arresting the prisoner, who, in the absence of such information, might well suppose that the apprehension was in fact unlawful. Suppose a person walking quietly along the street were to be told, by a man he met casually, that he must arrest him, and that the other refused when asked to show any authority; could it be contended that he must immediately assume the charge to be true, and go whithersoever the other chose to take him? If a prosecution for so serious an offence could be sustained on such evidence as this, no man would be safe in making any resistance when any other sought under any pretence to apprehend him, for it would always be possible that he had some lawful authority, although he studiously concealed it. In that class of offences in which a particular intent was alleged, it must be specifically proved to exist. For instance, although drunkenness was no excuse for crime, still where a man was alleged to have committed certain acts of violence with a particular intent, and he was proved to have been so drunk as to have been incapable of forming any deliberate intent,—whatever violence he might have committed, yet he could not be convicted of the crime charged.

*Cockle* (for the prosecution) submitted that there could be no doubt that the prosecutor had authority to apprehend the prisoner. He had received information of a felony having been committed, and he swore that he had reason to believe that the prisoner was the person who committed it; and if so, it was clear that he might arrest without a warrant. It was said that the prisoner had no information as to the charge made against him, but the prosecutor, although out of uniform himself, was acting with others who were in the police dress, and he told the prisoner that he wanted him for a highway robbery. It was quite unnecessary to prove that the prisoner knew the arrest to be lawful; in fact, it would be impossible to prove it. If the witness had given more particular information, it might still have been urged that it was not sufficiently specific. Then, had he shown a legal warrant, the prisoner might have required proof that the person whose signature it bore was a magistrate, and there would be no limit to objections of want of particularity in the charge, if its absence would give impunity under such circumstances as these. It was true that, if a man was so drunk that he could form no intent at all, he could not be convicted of having had one; but here the prisoner clearly had an intent to resist an apprehension which was proved to be lawful.

*Robinson* (in reply).—It was not contended that a man was entitled to require demonstrative proof that the apprehension was lawful, but that the circumstances were such as to afford him reasonable ground for believing that it was so. With regard to drunkenness, the cases went much further than to show that, for a man to be excused, he must be incapable of forming any intent at

REG.  
v.  
BENTLEY.  
1850.

*Resisting lawful  
apprehension.*

REG.  
v.  
BENTLEY.  
—  
1850.  
—

*Resisting lawful  
apprehension.*

all. He might have sufficient sense left to know that a blow would cause injury, or a wound would draw blood; but he could not be convicted on such a charge as this, unless he were capable of deliberately forming the intent to do what he was charged with doing.

TALFOURD, J.—I am of opinion, that the objection taken is not well founded. There is, upon the evidence, a sufficient case for the jury. I think that, to support a charge of resisting a lawful apprehension, it is enough that the prisoner is lawfully apprehended, and it is his determination to resist it. If the apprehension is in point of fact lawful, we are not permitted to consider the question, whether or not he believed it to be so, because that would lead to infinite niceties of discrimination. The rule is not, that a man is always presumed to know the law, but that no man shall be excused for an unlawful act from his ignorance of the law. It was the prisoner's duty, whatever might be his consciousness of innocence, to go to the station-house and hear the precise accusation against him. He is not to erect a tribunal in his own mind to decide whether he was legally arrested or not. He was taken into custody by an officer of the law, and it was his duty to obey the law.

*The prisoner was found guilty.*

*Cockle for the prosecution.*

*B. C. Robinson for the defence.*

## COURT OF CRIMINAL APPEAL.

November 22, 1850.

(Coram POLLOCK, C. B., WIGHTMAN, J., WILLIAMS, J.,  
TALFOURD, J., and MARTIN, B.)

REG. v. HENRY CRADDOCK.(a)

*Indictment—Several counts for stealing and receiving the same goods—  
“So as aforesaid stolen”—Inconsistency of the verdict on one count  
with the verdict on another.*

*An indictment contained two counts: one charged the prisoner with  
stealing the goods of A. B.; the other charged him with feloniously  
receiving “the goods aforesaid, so as aforesaid feloniously stolen.”  
The jury acquitted the prisoner on the first count, but found him  
guilty on the second. It was objected, that “so as aforesaid stolen,”  
meant stolen by the prisoner, which the jury had negatived:*

*Held, that the conviction was right, some of the judges being of opinion  
that the verdict on the second count could not be defeated by the ver-  
dict on the first, even if the second count was to be taken as charging  
that the prisoner received goods which had been stolen by him; others  
thinking that the second count had not that meaning.*

HENRY Craddock was tried at the Quarter Sessions for Northumberland, on the 3rd of July, 1850, on an indictment, the 1st count of which charged that he on, &c., one promissory note for the payment of 10*l.*, and one piece of paper of the value of one penny, of the property, goods and chattels of Robert Harvey, from the person of the said Robert Harvey (the said sum of 10*l.* being then and there due and unsatisfied to the said Robert Harvey), then and there feloniously did steal, take, and carry away, against the form of the statute, &c.

The 2nd count was similar to the 1st, except that it charged him with stealing a “bank note,” instead of a promissory note.

The 3rd count charged that Henry Craddock, late of the parish aforesaid, in the county aforesaid, on the day and year aforesaid, at the parish aforesaid, and in the county aforesaid, the goods and chattels aforesaid, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have, then and there well knowing the said goods and chattels last aforesaid to have been feloniously stolen, taken, and carried away, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

The jury found the prisoner not guilty upon the 1st and 2nd

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.



REG.  
v.  
HENRY  
CRADDOCK.  
—  
1850.

Indictment—  
Counts for  
stealing and  
receiving.

counts, but guilty of receiving under the 3rd count. Upon this, the counsel for the prisoner moved in arrest of judgment, because the jury had acquitted the prisoner of the stealing, and in the last count it was stated that the prisoner did receive the same goods and chattels "so as aforesaid feloniously stolen;" whereas the jury having found that he had not stolen the same, they could not, under the 3rd count, as it was worded, find him guilty of receiving the goods so alleged to be stolen by him. The counsel for the prosecution contended that the words "so as aforesaid" in the count for receiving, might be struck out as surplusage, which the court refused to do. The court, however, granted a case for the opinion of either bench, or the Barons of the Exchequer, under the statute, and postponed judgment. The question for the opinion of the court was, whether the prisoner was properly found guilty under the count for receiving, as set forth in the indictment.

*Otter* (for the prisoner).—The conviction on the 3rd count cannot be sustained, consistently with the verdict upon the 1st and 2nd counts. The 3rd count alleges that the prisoner feloniously received the said goods and chattels, "so as aforesaid feloniously stolen." Then what is the meaning of that allegation? It means that he received the goods mentioned in the 1st and 2nd counts, which he had feloniously stolen. *R. v. Woolford & Lewis* (1 Moo. & Rob. 384), is precisely in point. There the prisoner Woolford was indicted for stealing a gelding, and Lewis for receiving it, knowing it to have been "so feloniously stolen as aforesaid." Woolford was acquitted, and as the proof failed against him, Patteson, J. held that although the horse had been stolen by some one, the other prisoner, Lewis, could not be convicted upon that indictment, which charged him with receiving the gelding "so feloniously stolen as aforesaid." That learned judge, therefore, put upon these words the construction now contended for; and if that be the right construction, then the prisoner is entitled to an acquittal upon the 3rd as well as the other counts, because the jury have expressly negatived the stealing by him. The difficulty would have been avoided if the usual form had been adopted, and the offence of receiving had been laid as a substantive offence, as in the precedent given in Archbold (Pleading and Evidence in Criminal Cases, p. 272), where the form is "before then feloniously stolen." [WIGHTMAN, J.—Do the words "so as aforesaid stolen" necessarily mean stolen by the prisoner? May not the meaning be merely that they were stolen? Because, if so, we are bound to construe them so as to avoid repugnancy.] "So as aforesaid," describes the manner of the stealing as alleged in the other counts. It must mean more than the words "before then feloniously stolen." Besides, *R. v. Woolford* decides the point. [POLLOCK, C. B.—In that case the learned judge seems to have entertained some doubt whether his direction was right; but it became unnecessary to consider the matter further, as the prisoner was acquitted altogether. That case, however, does not decide that if the jury had found Lewis guilty of receiving, that

Argument for  
the prisoner.

verdict could have been affected by the finding on the other count. And I confess it seems to me that as this is in the nature of a motion in arrest of judgment we ought to confine our attention to the 3rd count. It is not disputed that that is a good count. Then the jury have found a verdict of guilty; and I think that if that count means that the goods had been stolen by the prisoner, they must be taken upon this count to have found that fact. Then the verdict amounts to this, that the prisoner feloniously received goods which he had before feloniously stolen; and I am not aware that there can be any objection to such a finding.] If it be possible, the court must reconcile the finding of the jury on the different counts; and it is possible to do so here, by supposing the jury to have found that the defendant feloniously received the goods, though they were stolen by somebody else. That is the real meaning of their verdict taking it altogether; and the effect of that verdict is, that all the three counts are disproved. This is not strictly a motion in arrest of judgment, which proceeds on the ground that, admitting all the facts alleged to be proved, the pleading is deficient. Here the ground is that the finding of the jury negatives the charge as laid. [MARTIN, B.—Suppose two counts, in every respect identical, and a verdict of guilty on one and of not guilty on the other, there being only one offence proved, could the prisoner set off one verdict against the other and arrest the judgment?] Perhaps not, because every count of an indictment is in point of law supposed to charge a separate offence. Here the difficulty arises, because an allegation in the 1st count, which the jury have negatived, is imported by words of reference into the 3rd. The late act of Parliament (11 & 12 Vict. c. 46, s. 3,) only authorizes the addition of “a count for feloniously receiving *the same property*,” which is in other counts alleged to have been stolen. Therefore, in an indictment for larceny, to add a count for receiving other goods would still be a misjoinder; and the court, therefore, must take judicial notice that the stealing alleged in the 3rd count is the very same stealing alleged in the other counts and negatived by the jury.

*Liddell* for the prosecution.

POLLOCK, C. B.—We are all agreed in this case that the conviction on the 3rd count may be sustained, and that there is no ground for arresting the judgment. Some of us think that the words in that count, “so as aforesaid feloniously stolen,” do not necessarily import that the goods were feloniously stolen by the said Henry Craddock; but even if that be the meaning, other members of the court are of opinion that the conviction is, nevertheless, right, inasmuch as the jury must be taken upon that count to have found all the material facts alleged therein.

*Conviction affirmed.*

REG.  
v.  
HENRY  
CRADDOCK.  
—  
1850.

*Indictment—  
Counts for  
stealing and  
receiving.*

*Argument for  
the prisoner.*

*Judgment.*

## COURT OF CRIMINAL APPEAL.

November 26, 1850.

REG. v. JOHN WILEY.(a)

*What constitutes a felonious receiving of stolen goods within the stat. 7 & 8 Geo. 4, c. 29, s. 54.*

*A. and B. having stolen two cocks and five hens, were seen, at four in the morning, to go into the house of C.'s father with a sack which contained the stolen property. C. lived with his father. A. and B. remained in the house about ten minutes, and were then seen to come out of the back door, preceded by C. with a candle, A., as before, carrying the sack, and to go into a stable situate in an enclosed yard at the back of the house. The stable door was shut by one of them; and on the policemen going in they found the sack lying on the floor, tied at the mouth, and the three men standing round it, as if they were bargaining, but no words were heard. C., on being charged with receiving the poultry, knowing it to be stolen, said he did not think he would have bought the hens. C. being indicted for receiving, the jury were told that the taking of A. and B. with the stolen goods, as above, by C., into the stable over which he had control, for the purpose of negotiating about buying them, he well knowing the goods to have been stolen, was a receiving of the goods within the meaning of the statute.*

*Held, by Parke, B., Alderson, B., Patteson, J., Coleridge, J., Maule, J., Platt, B., Talfourd, J., and Martin, B., that the direction to the jury was incorrect, and the conviction wrong; by Lord Campbell, C. J., Cresswell, J., Erle, J., and V. Williams, J., that the direction and conviction were right.*

**A**T the Northumberland Quarter Sessions, holden at Newcastle-upon-Tyne, on the 26th July, 1850, Bryan Straugham, George Williamson, and John Wiley were jointly indicted for stealing and receiving five hens and two cocks, the property of Thomas Davison. It was proved that, on the morning of the 28th day of January, at about half-past four o'clock, Straugham and Williamson were seen to go into the house of John Wiley's father with a loaded sack, that was carried by Straugham. John Wiley lived with his father, in the said house, and was a biggler attending markets, with a horse and cart. Straugham and Williamson remained in the house about ten minutes, and were then seen to come out of the back door, preceded by John Wiley with a candle, Straugham again carrying the sack on his shoulders, and to go into a stable belonging to the same house, situate in an enclosed yard at the back of the house, the house and stable being on the same premises. The stable door was shut by one of them, and on the

(a) Reported by A. BITTLESTON, Esq. Barrister-at-Law.

policemen going in they found the sack lying on the floor, tied at the mouth, and the three men standing round it as if they were bargaining, but no words were heard. The sack had a hole in it, through which poultry feathers were seen protruding. The bag when open was found to contain six hens, two cocks, and some live ducks. There were none of the inhabitants up in the house but John Wiley, and on being charged with receiving the poultry, knowing it to be stolen, he said, "he did not think he would have bought the hens." The jury found Straugham and Williamson guilty of stealing the poultry laid in the indictment, and John Wiley guilty of receiving the same, knowing it to have been stolen. The bench told the jury that the taking of Straugham and Williamson, with the stolen goods, as above, by Wiley, into the stable, over which he had control, for the purpose of negotiating about buying them, he well knowing the goods to have been stolen, was a receiving of the goods within the meaning of the statute. The bench, however, submitted a question to this court, whether under the circumstances the conviction of Wiley was proper. The three prisoners were again jointly indicted for stealing and receiving the nine ducks, which were found in the sack above mentioned, and upon the same evidence, and upon the same direction by the bench the jury again found Straugham and Williamson guilty of stealing, and Wiley guilty of receiving the nine ducks, knowing them to have been stolen, and the bench reserved a similar question for the consideration of this court on this indictment.

REG.  
v.  
JOHN WILEY.  
1850.  
*What is a  
felonious  
receiving of  
stolen goods.*

This case was first argued on Saturday, April 27, before Lord Campbell, C. J., Parke, B., Alderson, B., Cresswell, J., and Erle, J. First argument.

*Otter*, for the prisoner.—The earlier statutes made it felony to buy or to receive; but the 7 & 8 Geo. 4, c. 29, s. 54, does not contain the word "buy;" and the buying of stolen goods is not now a felony, unless the goods are actually received into the possession of the buyer. The negotiation, therefore, between the thieves and Wiley has no weight. There cannot be a joint possession of thief and receiver, any more than of buyer and seller; the possession of one is antagonistic to that of the other: (*R. v. Parr*, 2 Moo. & R. 346.) An actual receipt is necessary to make out a case of civil liability within the Statute of Frauds: (*Farina v. Home*, 16 M. & W. 119.) *Hill's case* (1 Den. C. C. 453) is also in point, because here the property never was actually or "potentially" in the possession of Wiley.

*Liddell*, contra.—There was evidence for the jury of a possession by Wiley. He materially assisted in removing the stolen property into the stable, and he had first of all received it into the house: (2 East, P. C. 765; *R. v. Davis*, 6 Car. & P. 178; *Richardson's case*, 6 Car. & P. 335.) A constructive possession is enough; and *Hill's case* only introduces a difficulty by using the word "potential," the exact meaning of which it is not very easy to define. It is quite immaterial that the house belonged to the prisoner's father: (*R. v. Gruncell*, 9 Car. & P. 365.)

REG.  
v.  
JOHN WILEY.

1850.

*What is a  
felonious  
receiving of  
stolen goods.*

Argument of  
Otter for the  
prisoner.

*Otter*, in reply, cited *R. v. Wilkins* (1 Leach, 522.)

*Cur. adv. vult.*

By the direction of the judges, the case was re-argued on Tuesday, November 26, before Lord Campbell, C. J., Parke, B., Alderson, B., Patteson, J., Coleridge, J., Maule, J., Cresswell, J., Erle, J., Platt, B., Williams, J., Talfourd, J., and Martin, B.

*Otter*, for the prisoner.—By taking the thieves with the stolen property into the stable, the prisoner might perhaps have been indicted as an accessory at common law. [PARKE, B.—I doubt that, unless it was done to facilitate their escape.] At all events that is an offence quite different from the one charged; for to make him an accessory, he must receive the felon: (1 Hale, P. C. 618, 619, 620.) The early statutes upon this subject apply to persons “buying or receiving” stolen property: (1 Anne, stat. 2, c. 9, s. 2; 5 Anne, c. 31, s. 5; 25 Geo. 2, c. 10, s. 3; 21 Geo. 3, c. 69, s. 1); but in 7 & 8 Geo. 4, c. 29, s. 54, the word “buy” is left out, and “receive” stands alone; the inference, therefore, is, that a buying, still less a bargaining for, goods, is not enough, unless they are actually received. The question turns upon the meaning of the word “receive.” Now, with regard to stolen goods, the property and the constructive possession remain in the owner, from whom they have been stolen; the thief has no more than the actual possession; and if he does not part with that, he parts with nothing. He can give the receiver nothing but the actual possession; and the moment he gives that, he ceases to have any possession of any kind: (*Fyson v. Chambers*, 9 Mee. & W. 460.) In *Armory v. Delamirie* (1 Stra. 505), the plaintiff obtained possession lawfully; but if an unlawful possession is lost, trover cannot be maintained. Such being the situation of the thief and receiver, in order to constitute a receiving, there must be a willing parting with the possession on the part of the thief, and a willing taking of possession on the part of the receiver. [LORD CAMPBELL, C. J.—May there not be a joint possession by the thief and receiver?] It is submitted that there cannot; for the possession of the thief is antagonistic to that of the receiver. In *R. v. Wade* (1 Car. & K. 739), it appeared that W. had stolen a watch from A.; and while W. and L. were in custody together, W. told L. where he had “planted” it. Upon L.’s discharge, he went to the place and took the watch; upon which Pollock, C. B., said,—“if this was an act done by the prisoner (L.) in opposition to W., or against his will, then it might be a question whether it would be a receiving. [ALDERSON, B., referred to *R. v. Hill*, 1 Den. C. C. 453; 3 Cox C. C. 533.] That case shows that no constructive receipt is sufficient. [LORD CAMPBELL, C. J.—The expression is “possession actual or potential;” it implies therefore that there may be a sufficient possession without corporal touch. MARTIN, B.—What is meant by “potential possession?”] It means at least that it should be accompanied with a disposing power; it cannot mean a constructive possession; because in that case the prisoner had a constructive possession of the stolen property by the delivery to

the carrier for her. [ALDERSON, B.—There must be actual possession; but two people may have actual possession at the same time.] *Reg. v. Parr* (2 Moo. & Rob. 346), is an authority against the notion of a joint possession by thief and receiver. In the present case, Wiley never had manual possession of the stolen goods; and it is clear that the thieves did not intend to part with the possession without payment, or at all events until the bargain was complete. [LORD CAMPBELL, C. J.—Suppose the bargain had been completed, but the policeman came in whilst the parties remained in *statu quo*? PARKE, B.—You say that there must be a giving by the thieves.] Yes. [ALDERSON, B.—It is consistent with the direction of the chairman that the thieves kept possession all the time. PARKE, B.—Yes; it considers the simple act of taking the thieves with the goods into the stable, a receiving.] Suppose that Wiley had knocked down the thieves, and taken the stolen property from them, might he not have been indicted for stealing them? Would there not have been a sufficient possession by the thieves to maintain trespass? (*Purnell v. Young*, 3 Mee. & W. 288; *Ashmore v. Hardy*, 7 Car. & P. 501.) If the price had not been agreed, the thieves might and would have taken the goods away. The prisoner had still a *locus penitentiæ*. [PATTESON, J.—If the goods were left for several hours in Wiley's house, with his permission, he might be guilty of receiving, though the thieves afterwards took them away.] That would be a very different case. Here they were not left by the thieves at all.

*Liddell*, contra.—The direction of the chairman imports all the facts previously stated up to the apprehension of the prisoners; because the expression is, taking the thieves "as above." In the argument for the prisoner, a constructive possession *per alium* has been confounded with a joint actual possession by two. In *R. v. King* (Russ. & Ry. 332), goods had been removed from the possession of the prosecutor by A., in the absence of B., and B. afterwards joined in carrying them away; it was held that B. could not be convicted of stealing; and in 2 Russ. on Crimes, 240, the case is classed as a case of receiving. It is doubtful whether mere naked possession will support either trespass or trover, so that test fails; but the real question is, had the prisoner actual or potential possession? [LORD CAMPBELL, C. J.—If a man knowingly receives stolen goods *malo animo*, is he not a receiver within the statute?] That is the definition in 2 East P. C. 766; and actual does not necessarily mean manual possession. If a letter is dropped into a letter box, it is in the possession of the owner of the box; he has the power of taking it into his manual possession at any moment. Here Wiley exercised a control over the goods. [LORD CAMPBELL, C. J.—Suppose that he had assisted in carrying the bag.] In that case he would clearly be guilty of receiving. [LORD CAMPBELL, C. J.—Then, does it make any difference, the three being engaged in a joint act, which carries the bag and which the candle?] Not the least. Under the statute 2 Will. 4, c. 34, ss. 7 and 8, it has been decided that a possession of counterfeit coin

REG.  
v.  
JOHN WILEY.  
1850.  
What is a  
felonious  
receiving of  
stolen goods.

Argument of  
Liddell for the  
prosecution.

REG.  
v.  
JOHN WILEY.

1850.

*What is a  
felonious  
receiving of  
stolen goods.*

by one of two persons is the joint possession of both, if they were acting in concert, and both had knowledge of the possession: (*R. v. Rogers*, 2 Moo. C. C. 85; *R. v. Gerrish*, 2 Moo. & Rob. 219.) Then "receive" and "have in possession" are convertible terms: (*Cole's case*, 2 East P. C. 767.) [ERLE, J.—That case shows that they are not convertible terms. LORD CAMPBELL, C. J.—Was not Wiley as much in possession as the other two?] He had a "potential" possession. [LORD CAMPBELL, C. J.—I wish that word had not been used. It has no definite legal meaning.] It is satisfied, at all events, if the prisoner has the physical power of taking manual possession. [COLERIDGE, J.—If "as above" imports into the direction of the chairman all that had been previously stated, your argument may be well founded; but it is an odd expression.] If that is not so, there is no case against Wiley at all; because he may have taken the men into the stable quite innocently. The chairman must be understood as speaking with reference to all the circumstances of the case; otherwise why are they all stated? The different statutes which have been referred to were passed with the intention of enlarging the definition of an accessory after the fact; but, unless this is a receiving within the statute, the effect will have been to narrow instead of enlarge it.

Otter in reply.

*Otter*, in reply.—The conviction cannot be sustained if it is doubtful in whose possession the goods were. *R. v. Gerrish* affords no assistance in interpreting the word "receive," upon which this question turns. In that case the joint possession would convict both of the same offence; but it would be a strange consequence if a joint actual possession by two should be sufficient to convict one of the offence of stealing and the other of that of receiving. The direction of the chairman excludes from the consideration of the jury all that occurred in the stable. [CRESWELL, J.—Suppose B. is in danger of being captured, and C. knowing that B. is carrying stolen goods, conceals him in his house, does he feloniously receive the goods?] He does not. [PARKE, B.—You say that there must be a receipt of the goods independent of the receiving of the thief.] Yes, if a lodging-house keeper is asked to buy a stolen watch, and says, "sleep here, and I'll tell you in the morning," is he guilty of receiving stolen goods, though in the morning he may say, "I will have nothing to do with it?" [PARKE, B.—He who receives a thief is not an accessory, unless he does it with a view to assist the thief in eluding justice. LORD CAMPBELL, C. J.—Instead of a watch, put the case of a hamper. Suppose A. brings a hamper to B.'s house, and says "I have stolen this, will you keep it for me till the morning," and B. consents, is he not a receiver of stolen goods?] That would depend upon whether the thief parted with the possession of it. If the thief left it, he probably would be held a receiver; but if the thief remained with it all night, and he only received the goods and the thief together, it is submitted that he would not.

*Cur. adv. vult.*

The learned judges retired to consider the case, and after some interval returned into court, and, differing in opinion, delivered their judgments *seriatim*.

MARTIN, B.—I am of opinion that this conviction is wrong. The question turns upon the construction of the stat. 7 & 8 Geo. 4, c. 29, s. 54, which enacts “that if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law, or by virtue of this act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony:” and I apprehend that the true rule of construction is laid down in the case of *Becke v. Smith* (2 Mee. & W. 195), by Parke, B., who says “it is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used and to the grammatical construction, unless that is at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further.” Now the question is, what is the meaning of the word “receive” as applied to the facts of this case? I understand the facts to be these. Two men stole some fowls, which they put into a sack, and carried to the house of Wiley’s father, for the purpose of selling them to Wiley. All three went together from the house to an outhouse; the bag was carried on the back of one of the thieves; and when the policeman went in, the sack was found lying on the floor, unopened, and the three men around it as if they were bargaining, but no words were heard. Now I am of opinion that Wiley, under those circumstances, never did receive those fowls. I entirely agree that the question arises upon the possession; there is no question of property here, for that remained in the original owner; but it seems to me that the two men had the stolen articles in their possession as vendors adversely to Wiley; and that they never intended to part with that possession unless some bargain was concluded for the purchase of them. Upon this ground I am of opinion that Wiley never did “receive” the goods in the ordinary and proper sense of that word, and I think it is exceedingly important that offences should be so broadly and clearly defined that all persons may understand what is the offence with which they are charged.

TALFOURD, J.—I am also of opinion that this conviction is wrong. The question turns on the word “receive,” as applied to the facts of this case; and it seems to me that the magistrate gave an improper direction to the jury on that subject, because he told them that the taking by Wiley of the two thieves with the stolen goods in the manner stated to a stable, over which he had control, for the purpose of trafficking as to the purchase of the stolen property, was a receiving within the statute; and I think it was not. The persons asserting the right of possession at that time were the two thieves; and the position of Wiley, as a person negotiating for the purchase, excludes the idea of his having any

REG.  
v.  
JOHN WILEY.

1850.

What is a  
felonious  
receiving of  
stolen goods.

Judgment of  
Martin, B.

Judgment of  
Talfourd, J.



REG.  
v.  
JOHN WILEY.

1850.

*What is a  
felonious  
receiving of  
stolen goods.*

Judgment of  
Platt, B.

Judgment of  
Erle, J.

possession. There was still for him a *locus penitentiae*; he might still have determined not to take the fowls; and the whole matter was, I think, inchoate and incomplete.

WILLIAMS, J.—I am of opinion that this conviction is right. I think that the charge was made out against Wiley, if the jury were satisfied that he had possession of the property, knowing it to be stolen, with a corrupt and wicked mind. In this case there is no doubt as to his knowledge, or as to the corrupt and wicked mind; and the only question is, whether he had possession. Now, it appears to me that he had a common purpose with Straugham and Williamson of carrying the stolen goods from the house to the stable; and to effectuate that purpose it was necessary that one or more of them should have manual possession of the goods. Accordingly, one hand carried the sack; and that was not Wiley's; but as the three had a common purpose, I think that they were all agents of one another, and that the possession of the man who had the fowls was the possession of the prisoner.

PLATT, B.—I concur in opinion with my brothers Talfourd and Martin, and think the conviction wrong. In order to convict Wiley as a receiver of stolen goods, I think that it was necessary to show that he actually received the goods, that is, that they were in such a position as to be under his dominion, exclusive of that of the thieves. If it was to be taken that, while the sack was carried from the house to the stable, and Wiley was lighting the carrier, the goods were in the joint possession of the three at that time, this difficulty must arise—that the same act which constituted the joint possession by the hand of one of them, would be a felonious *asportavit* by the one, and a felonious receiving by the other; the very same act would convict the two of entirely different offences. I think that cannot be; and that as no bargain had been begun at that time, and the thieves retained the control and possession of the goods,—not a legal possession, of course, but the actual possession,—and as there was no intention on the part of the thieves of parting with the property, unless a bargain was made, it would be much too strong to say that a party who only contemplated becoming the possessor, if a bargain could be completed, was a receiver within the statute. Therefore, in my opinion, the direction of the chairman was wrong.

ERLE, J.—I am of opinion that the conviction was right on two grounds. First, upon the facts found and left to the jury, I think that Wiley co-operated with the thieves in removing the stolen property from the house to the stable, which was under his control, for the purpose of more securely bargaining and evading the officers of the law. If Wiley had actually taken part in carrying the goods, I believe in the minds of many of the judges there would be no doubt that he had had a joint possession with the thieves, which would be sufficient to convict him of the present charge; and as he accompanied them, and lighted them to the stable, I think he did co-operate with them in transporting the goods as much as if he had helped to carry them. I found my

opinion on the law, which has often been laid down, that where goods are stolen, and the removal from the owner's premises is complete, and the thief afterwards procures somebody to assist him in removing them again to a place of greater security, the person who so removes them is not liable to be convicted of larceny, because by the first removal the larceny was complete. A person who so co-operates is certainly a criminal within the intention of the law, and I think that the law is strong enough to reach him as a receiver of stolen goods. That is one ground of my opinion; but I also attach a wider meaning to the word "receive" than some of my learned brothers are disposed to give to it. It appears to me that, with reference to acts of felonious receiving or taking, the rules of the civil law relating to possession have no application. (a) Originally, the person who received and assisted a thief, after he had committed a larceny, was held to be an accessary after the fact, but then several statutes were passed, in consequence of the imperfect state of the law, which only rendered a person punishable who harboured the thief. By those statutes the guilty receipt of the stolen property was made punishable; and I think that the word "receive," as applied to the goods, ought to be construed with reference to the other offence of harbouring the thief. If a man harbours a thief, with a view in any way to assist his escape, he is guilty; and so, I think, if he harbours the goods, for the purpose of assisting the thief, he is guilty of a felonious receiving, within the meaning of the statute. If the owner of a stable authorizes thieves to deposit in that stable stolen goods, he is guilty of receiving them. That proposition by itself would probably not be contested; and I think that, if he authorizes the thieves to go into the stable with the stolen goods, he is not the less a receiver because the thieves stay with the property. The earlier statutes clearly did not contemplate a bargain or consent to the transfer of the stolen property as essential to the offence of receiving; for both in the 29 Geo. 2, c. 30, and 2 Geo. 3, c. 28, the crime of receiving is expressed thus:—"Every person who shall privately buy or receive any stolen lead, &c., by suffering any door, window, or shutter to be left open or unfastened between sun-setting and sun-rising, for that purpose;" so that the offence there contemplated involved no communication with the thief at all, after he had possession of the stolen goods, but applied to the practice of leaving open a place of deposit previously known to the thieves. Such a case is certainly within the mischief of the statute; and in 2 East P. C. 765, it is expressly laid down, "that in order to constitute a receiver, generally so called, it is not necessary that the goods should be actually purchased by him: neither does it seem necessary that the receiver should have any interest whatever in the goods; it is sufficient if they be in fact received into his possession in any manner *malo animo*, as to favour the

REG.  
v.  
JOHN WILEY.  
1850.

*What is a  
felonious  
receiving of  
stolen goods.*

(a) The correct use of the term "possession" requires extensive and precise knowledge, and the introduction of the term into the description of a felony would give complexity, and not clearness, to the criminal law: (see Von Savigny on Possession, by Sir Erskine Perry.)

REG.  
v.  
JOHN WILEY.  
—  
1850.  
*What is a  
felonious  
receiving of  
stolen goods.*

Judgment of  
Cresswell, J.

thief;" and the same law is to be found in 2 Russ. on Crimes, 247, where several authorities are cited. It is there said: "If the prisoner received the property for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased it:" (Per Taunton, J., *R. v. Richardson*.) It seems to me, therefore, that the statute contemplated precisely such a taking as is proved in this case. With respect to the latter ground of decision, I take into consideration the facts that the goods were taken into the stable, and were found lying on the ground there in the manner stated.

CRESSWELL, J.—I agree with those of the judges who think the conviction right. The direction of the chairman is the matter to be looked at; and the words "as above" embody in the summing up the manner in which the goods were taken to the stable. Wiley carried the light, and he, therefore, assisted in the removal of the goods to the stable. If the goods had been carried by the thieves from one part of the owner's premises to another, but not finally taken away, and the prisoner Wiley had afterwards been called in to assist in removing them off the premises, he would undoubtedly have been guilty of larceny; there would have been a sufficient *asportavit* by him, and he would, therefore, have had a joint possession in so removing them. Substituting, then, for the deposit on the premises of the original owner, a deposit elsewhere, the a prisoner who assists in the removal of them must equally have joint possession during that removal; and knowing them to be stolen, he is, I think, whilst he is engaged in that act, a felonious receiver. If it were necessary, I should be also inclined to put the larger construction on the word "receive" suggested by my brother Erie.

MAULE, J.—I think that this conviction is wrong.

Judgment of  
Coleridge, J.

COLERIDGE, J.—I also think the conviction wrong. We must decide this case upon the direction given by the chairman at sessions; which, if construed strictly, might confine the case to the mere fact of leading the thieves to the stable; but I think it is far better and more convenient to treat it as including all the circumstances stated upon the case. Looking, then, at the circumstances, it is to be observed that the case states no previous invitation by the prisoner, or communication between him and the thieves; but he is in his father's house with the thieves, and he helps them to convey the goods to the stable, with, it may be assumed, the guilty purpose of buying, and so obtaining possession of the stolen property, upon a contingency which never happened. Until some bargain had been concluded, he never intended to take charge of it, nor, in fact, could he have taken possession. This, therefore, is not a case of joint constructive possession; nor did the thieves intend to admit him to any actual possession except upon a bargain which was never made. The charge of receiving must import possession, actual or constructive; and in this case, I can find neither one or the other. I entirely concur with my brother Martin in thinking that, in administering the process of the criminal law, we ought to go on broad grounds of construction, intelligible to ordinary people.

PATTESON, J.—Upon the whole, I am of opinion that this conviction is wrong. I do not mean to say that it is necessary, in order to constitute a receiving, that the prisoner should in every case actually touch the stolen property, or, that there may not be cases of joint possession by the thief and receiver, in which a conviction would be proper; but I think that there must be such circumstances in the case as will show that the stolen property was under the control or power of the receiver, either jointly with or separately from the thief; and in my opinion there is an absence of such circumstances in this case. Here the property was all the time in the manual possession of the thieves; Wiley conducted them to a place where it was proposed to bargain for the purchase, but he is apprehended before the sack is opened, or anything done. How far the fact that the sack was found lying on the floor of the stable, and the three men round it, might have justified a conviction, I cannot inquire, because the chairman directed the jury that the taking into the stable was in itself a receiving; but I incline to think that fact would not have fixed the prisoner, because it was not intended that the goods should be taken by him until a bargain had been made.

REG.  
v.  
JOHN WILEY.  
1850.

*What is a  
felonious  
receiving of  
stolen goods.*

Judgment of  
Patteson, J.

ALDERSON, B.—I agree with the majority of the court. There is nothing to show that the goods were ever out of the manual possession of the thieves. I agree that there may be a joint possession by the thief and receiver; and if the stolen articles had ever been out of the manual possession of the thieves, and had then been jointly conveyed by the three, Wiley might have been liable to be found guilty as a receiver; but here the thieves take the goods into the house; it does not appear what took place in the house; then they come out, and Wiley admits them into a stable under his control. There is nothing to show that, before they went into the house, there was any previous communication. Now, those are all the facts which were left to the jury in this case, and I think that they were not sufficient for the purpose. The prisoner never had possession; he intended to bargain for the property, and to take possession if the bargain was completed, but he never did so. There must in these cases be a dividing line, which it is always difficult to define with accuracy; but I think in this case the dividing line was not reached, and that the bench laid down an inaccurate rule to guide the jury.

Judgment of  
Alderson, B.

PARKE, B.—I also think the conviction wrong. It is our duty to confine ourselves to the case submitted to us; and the question reserved is whether the conviction is right—the bench having told the jury “that the taking of Straugham and Williamson with the stolen goods, *as above*, by Wiley into the stable, over which he had control, for the purpose of negotiating about the buying of them, he well knowing the goods to have been stolen, was a receiving of the goods by him within the meaning of the statute.” We are not to speculate whether the three were *participes criminis*; the word “receive” must be understood in its ordinary signification; and must mean a taking into possession, actual or constructive. Here, I think, there is no proof that the property ever got into

Judgment of  
Parke, B.

REG.  
v.  
JOHN WILEY.

1850.

*What is a  
felonious  
receiving of  
stolen goods.*

Judgment of  
Lord Campbell,  
C. J.

the possession of Wiley at all,—certainly none, by his taking Williamson and Straugham into the stable. He never touched the goods, and they never intended to part with the possession of them, except upon the contingency of his becoming a purchaser, which did not happen. The only question is, whether by letting the thieves with the goods into the stable, he received the goods. I think that there must be a receiving of the goods into possession as distinct in some way from the receiving of the thief; and that the receiving of the thief with the goods into a house is not a receiving of the goods within the statute, in a case like this, any more than it would be in the case of a thief received into a house with a stolen watch in his pocket.

LORD CAMPBELL, C. J.—I agree with those of the judges who think the conviction right, and concurring in their reasons, I have little to add. I think that there is a receiving within the statute wherever a person, knowing goods to be stolen, has possession of them for a bad purpose. It is wholly immaterial whether he has any property in them; and if we look to analogies derived from the Statute of Frauds, or the rules relating to actions of trespass or trover, our judgment is likely to be misled. The material question is, whether there has been a possession *malo animo*; and all the judges, I believe, are of opinion that there may be a sufficient possession, though there is not a manual possession. Now, what are the facts from which it may be said that Wiley had possession? The sack was brought to his father's house; and he enters into a common purpose with the thieves of carrying the goods from the house to the stable, over which he had control, for the purpose of bargaining, and that was an illegal purpose. Then, had not Wiley possession for that purpose? The thieves had no intention of then finally parting with the possession; but they had the common purpose of carrying the goods into the stable. Straugham carried the sack; but the possession of Straugham was also the possession of Williamson, and if of Williamson, why not of Wiley also? he went before with the candle. Suppose he had assisted in the very act of carrying it, would he not have had possession? And does it signify what part each took in carrying out the common purpose? No doubt there may be a joint possession by the thieves and the alleged receiver; and it seems to me that, during that removal, Wiley certainly had such a joint possession of the stolen property; but I cannot stop there. Upon a fair construction of this case, I think that the whole transaction was laid before the jury, and that we are to express our opinion upon the whole case. Then, what follows? The sack is found lying in the stable; no one touching it; it is not in the actual manual possession of any one of the three, but, in my opinion, quite as much in the possession of Wiley as of the others. I cannot say that there can be no possession by the receiver unless the thieves had intended permanently to part with the possession; and so, I think the verdict warranted by the evidence of what occurred in the stable.

*Conviction reversed.*

## COURT OF CRIMINAL APPEAL.

January 18, 1851.

(Before JERVIS, C. J., PATTESON, J., CRESSWELL, J.,  
ERLE, J., and MARTIN, B.)

REG. v. MARY ANNE MEARS AND AMELIA CHALK. (a)

*Procuring prostitution by false pretences—Statute 12 & 13 Vict. c. 76—  
Conspiracy to commit that offence—Indictment—Evidence.*

*An indictment charged that A. B. and C. D. did between themselves conspire, combine, confederate, and agree together, wickedly, knowingly, and designedly, to procure, by false pretences, false representations, and other fraudulent means, one J. C., then being a poor child, under the age of twenty-one years, to wit, &c., to have illicit carnal connexion with a man, to wit, a man whose name is to the jurors unknown, contra formam statuti.*

*Held good, as disclosing an indictable offence at common law, and supported by the evidence stated in the case.*

**T**HE prisoners Mary Ann Mears and Amelia Chalk were tried at the Epiphany Sessions for the town and county of the town of Southampton, held on the 7th of January, 1851, before Edward Smirke, recorder, upon the following indictment, to which they had pleaded not guilty.

Borough, town and county of the town of Southampton.—The Indictment.  
jurors for our Lady the Queen, upon their oath and affirmation present, that Mary Ann Mears, late of the parish of Saint Mary, in the town and county of the town aforesaid, single woman, being a person of wicked and depraved mind and disposition, and contriving, and craftily, and deceitfully intending to debauch and corrupt the morals of one Johanna Carroll, as hereinafter mentioned, and to seduce her into an infamous and wicked course of life, heretofore and after the passing of a certain act of Parliament for the better preventing the heinous offence of procuring the defiling of women, to wit, on the 14th day of November, A. D. 1850, with force and arms, at the parish aforesaid, in the town and county aforesaid, did knowingly, deceitfully, and unlawfully attempt and endeavour, as much as in her lay, to procure the said Johanna Carroll, the said Johanna Carroll then and there being a child under the age of twenty-one years, to wit, the age of fifteen years, an orphan and a servant out of place, to have illicit carnal connexion with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, by then and there knowingly and unlawfully falsely and fraudulently pretending and representing

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

REG.  
v.  
M. A. MEARS  
AND  
A. CHALK.  
—  
1851.  
—

*Conspiracy to  
procure  
prostitution.*

Indictment.

Second count.

Third count.

to the said Johanna Carroll that she the said Mary Ann Mears was the friend of the said Johanna Carroll, and knew her father and mother, and that if she the said Johanna Carroll would go home with her the said Mary Ann Mears, the said Mary Ann Mears would keep her until she the said Johanna Carroll could get a place, and that she the said Mary Ann Mears would herself try all she could to get her a place, and by then and there, under such false and fraudulent pretences and representations, taking her the said Johanna Carroll to the house of the said Mary Ann Mears, and keeping her there for a long space of time, and soliciting her and trying to induce her then and there to have illicit carnal connexion with the said man, whereas in truth and in fact the said Mary Ann Mears was not the friend of the said Johanna Carroll, and the said Mary Ann Mears did not intend to take, and did not take the said Johanna Carroll home with her to keep the said Johanna Carroll till she the said Johanna Carroll could get a place, or till she the said Mary Ann Mears could obtain a place for her, but craftily and subtilly with the wicked design and purpose, by the said false and fraudulent pretences, representations, and means aforesaid, to procure the said Johanna Carroll to have connexion with a man as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath and affirmation aforesaid, do further present, that Amelia Chalk, late of the parish aforesaid, in the town and county aforesaid, labourer, at the time of the committing of the said misdemeanor by the said Mary Ann Mears, as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, at the town and county aforesaid, the said Mary Ann Mears to do and commit the said misdemeanor, wickedly, knowingly, and unlawfully did abet and assist, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. That the said Mary Ann Mears and Amelia Chalk afterwards, to wit, on the day and year last aforesaid, with force and arms, at the parish aforesaid, in the town and county aforesaid, wickedly, designedly, and unlawfully did attempt and endeavour, by false pretences, false representations, and other fraudulent means, to procure the said Johanna Carroll, then being a child under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connexion with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. That the said Mary Ann Mears and the said Amelia Chalk afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the town and county aforesaid, did between themselves conspire, combine, confederate, and agree together wickedly, knowingly, and designedly to procure by false pretences, false representations, and other fraudulent means, the said Johanna

Carroll, then being a poor child under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connexion with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

The following was the case proved in evidence in support of the indictment, so far as is material to the question reserved.

The prosecutrix, Johanna Carroll, a girl aged fifteen, whose father and mother had been dead two years and upwards, had been put out to service by the guardians of the poor within the town and county of the town of Southampton. On Monday, the 18th November last, she left her last place, and not having got another, she applied to the landlord of a public-house at Southampton for a bed for that night. The landlord was unknown to her when she applied. The prisoner Chalk was present, and the prisoner Mears joined them shortly afterwards. The landlord said he could not give her a bed that night, but referred her to Mrs. Mears, who said she would let her have a bed sooner than let her sleep out. The prisoners were at the time living in the same house, in the said town, and had no apparent means of subsistence except by prostitution and receiving men in the house.

The two prisoners then took the prosecutrix home. In the course of conversation on their way and just after they got home, Mears, having learnt from the prosecutrix who she was and that she wanted to get into service again, told her that she knew her father and mother, and that she would let the prosecutrix remain in her own house without paying anything till she could get a place, and that she (Mears) would also try to get one for her.

The prosecutrix remained some days in the house, looking for a place and doing household work in the daytime, and sleeping with a little girl at night. Mears gave her food whilst there. On Tuesday evening the prisoners brought two men to the house, who stayed some time there, and drank with them. On Wednesday the two men again came and slept there, each with one of the prisoners.

On Thursday morning the prisoner Chalk talked to the prosecutrix, and advised her to go out and get money along with her as she herself did, but the prosecutrix did not follow her advice. On that day three men came in the afternoon to the house, and after staying a short time went away. One of them returned later in the evening. Whilst he and the prosecutrix and both prisoners were together in a room of the house, the man, who was unknown to the prosecutrix, called Mears out for a few minutes. In their absence the prisoner Chalk told the prosecutrix that they had perhaps gone out to talk about her (the prosecutrix), and to ask the man whether she and the man would go into the bedroom together. On the return of Mears and the man, Mears called her aside, and asked her whether she had any objection to go into the bedroom with the man. The prosecutrix refused, on which Mears

REG.  
v.  
M. A. MEARS  
AND  
A. CHALK.  
1851.

*Conspiracy to  
procure  
prostitution.*

*Evidence for  
the prosecution.*



REG.  
v.  
M. A. MEARS  
AND  
A. CHALK.  
—  
1851.

*Conspiracy to  
procure  
prostitution.*

said to her that it was the best way of getting a living. Chalk also urged her to go with the man, and Mears told her she would get some money from him if she did so. The prosecutrix persisted in refusing, and the man after drinking with the women left the house late at night. Mears then abused the prosecutrix, charged her with being shy, called her offensive names, and said that if she wanted to get her living she must get it as she did if she bided with her, and she threatened to turn her out without her clothes. The prosecutrix said she would go then, but Mears said she should stay till next morning.

On Friday a child of the prisoner Chalk, who was lying dead in the house, was buried. Early on Saturday the prosecutrix left the house without being allowed to take back her clothes, and having no friends or relatives to go to, returned to the workhouse. The prisoners, or one of them, had pawned part of the clothes, and Mears claimed to keep the rest to pay for the prosecutrix's lodgings, but eventually delivered them up to the inspector of police who had been sent to demand them.

The prosecutrix had no knowledge of the course of life followed by the prisoners till the third day, but she owned that she suspected it on the second.

There was no proof that the prisoners, or either of them, knew the parents of the prosecutrix, or that they or either of them ever tried to get any place as a servant for her.

Evidence for  
the prosecution.

Several witnesses to prove the girl Carroll's previous habits and good character, and other circumstances, were called for the prosecution.

The prisoners offered no evidence, and made no statement, in defence, nor were they defended by counsel.

The above facts were left to the jury as evidence under all the counts, and the jury were told that they could not find both prisoners guilty under the first and second counts, nor either of them guilty under the last, unless they believed that they acted in concert and with the common object of procuring the illicit connexion alleged in the indictment, by the false pretences and representations or fraudulent means charged.

The jury found both guilty on all the counts. The recorder passed sentence on each, but respited execution until the decision of the court upon the following questions, which he thought proper to reserve, namely,—

1st. Whether the above state of facts was evidence to go to the jury on all or any of the counts?

2nd. Whether the counts, or any of them, disclose an indictable offence, and are valid in point of law?

The prisoners were committed to prison for want of bail.

Argument for  
the crown.

C. Saunders (with him W. M. Cooke) for the prosecution.—This case was reserved by the recorder *ex mero motu*. The indictment is framed on 12 & 13 Vict. c. 76, which enacts: "That if any person shall, by false pretences, false representations, or other fraudulent means, procure any woman or child

under the age of twenty-one years to have illicit carnal connexion with any man, such person shall be guilty of a misdemeanor." Now that statute is capable of two constructions. One is, that in order to complete the offence it is necessary that the carnal connexion should actually have taken place; and that would be the ordinary meaning. The other is, that any person who took steps to bring about that connexion should be guilty of the offence; but in this case the indictment proceeds upon the other construction, and is framed for an attempt to commit the offence. As to the false pretences, the words of this statute, "false pretences, false representation, and other fraudulent means" are much larger than those of 7 & 8 Geo. 4, c. 29, s. 53, which relates to the obtaining of money or goods by false pretences. Under the latter act it is essential to prove that the representations made were false in fact; and it has been decided that a mere promise of future conduct, however fraudulently made, is not within the act. Under this statute it is submitted that any fraudulent means resorted to for the purpose of inducement are within the statute; and the enticing by promises is one of the principal mischiefs against which the act is directed. Here the false pretences alleged in the 1st and 2nd counts are quite sufficient. [JERVIS, C. J.—The pretence by the defendants that they knew the girl's father and mother, is not negatived in the indictment. The real false pretence is that they would try to get her a place.] And that they were her friends. [JERVIS, C. J.—Aiders and abettors in misdemeanor are principals: I never before saw an indictment for misdemeanor charging an aiding and abetting as in this case.] No doubt Chalk might have been indicted as principal jointly with Mears, but there is no objection to the form here adopted. As to the 3rd count,—if the object of the conspiracy is illegal, the means need not be set out. Whatever the prisoners did expressive of their meaning is evidence. (He was stopped by the court.)

JERVIS, C. J.—The question reserved is—whether there is any good count—and any evidence to be left to the jury in support of it. It is unnecessary to discuss the 1st and 2nd counts, and upon them we give no opinion, because we all think that the 3rd is a good count; the court being clearly of opinion that a conspiracy to solicit prostitution, being against good morals and public decency, is, independently of the statute, an indictable offence, and that there was evidence for the jury in support of it. In Burr. 1434, (*Delaval's case*), an information was granted for a conspiracy to debauch, though the girl was a consenting party; and there are several other cases mentioned in Russell. (a)

PATTESON, J.—There is also the Lady Henrietta Berkeley's case. (b)

*Conviction affirmed.*

REG.  
v.  
M. A. MEARS  
AND  
A. CHALK.  
—  
1851.  
—  
*Conspiracy to  
procure  
prostitution.*

(a) 2 Russ. on Crimes, p. 286.

(b) *R. v. Lord Grey and others* (3 State Trials, 519; 1 East P. C. p. 460.)

## COURT OF CRIMINAL APPEAL.

*January 18, 1851.*(Before JERVIS, C. J., PATTESON, J., CRESSWELL, J., ERLE, J.,  
and MARTIN, B.)

REG. v. WILLIAM DOVEY and ELIZABETH GRAY. (a)

*Indictment charging two with jointly receiving stolen goods. A separate receipt only being proved, which is to be acquitted.**Upon an indictment, which charged A. and B. with jointly receiving stolen goods, a joint receipt must be proved in order to convict both; but if a separate receipt by each is proved, that one may be convicted who is proved to have been guilty of the first separate act of receiving. Therefore, where the evidence was, that A. alone had received the stolen property from the thief, near to the place where it was stolen, in the middle of the night in which it was stolen, and that B. was only found in possession of part of it the next day at a considerable distance: Held, that B. could not be convicted; for the allegation in the indictment was satisfied by the evidence of a separate receipt by A.; and the evidence of a subsequent receipt by B. ought not to be submitted to the jury.*

AT the Epiphany Quarter Sessions for the County of Hants, holden at Winchester, on the 30th of December, 1850, William Dovey and Elizabeth Gray were charged on an indictment, a copy of which is hereunto annexed, in the 1st count, with stealing, and the 2nd count with receiving, twelve turkeys, knowing them to have been stolen.

Dovey, and a man named Hodder, who had absconded, both resided at Brook, in the county of Hants, near the premises of the prosecutor from which the property was stolen; they were both in company with others at a public-house, at eleven o'clock, on the night the turkeys were stolen; and at eight o'clock the following morning they were seen together, ten miles from Brook, on the road from that place to Salisbury, with a horse and cart belonging to Dovey. The same day Dovey sold two of the turkeys at Salisbury, and the other prisoner, Elizabeth Gray, who resided at Salisbury, was proved to have disposed of the remaining ten, at Salisbury, on the same day.

The prisoner Dovey made a statement, which was given in evidence, that he was called up at two o'clock, a.m., in the night on which the turkeys were stolen by Hodder, who brought the turkeys to him in a sack, and that he took them to Salisbury and sold them for Hodder.

The jury returned a verdict of guilty against both prisoners on the 2nd count, for receiving.

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

It was objected by counsel for Elizabeth Gray, citing *R. v. Messingham* (2 Moo. C. C. 257), that the prisoners could not be convicted, inasmuch as the indictment charged a joint receiving, whereas the evidence showed separate acts of receiving; and at the suggestion of counsel, I then put it to the jury whether they found a joint or a separate receiving, upon which they returned the following verdict:—

“We find that William Dovey received on the road between Brook and Salisbury, and Elizabeth Gray, at Salisbury. The prisoners were not together at the time.”

Sentence of imprisonment was passed upon both prisoners, and execution respited. Elizabeth Gray was admitted to bail, and William Dovey was remanded to prison, until the question arising on his conviction shall have been decided.

The opinion of the Court of Appeal is prayed whether upon this verdict the judgment given ought to be reversed in favour of both or either of the prisoners.

*C. Saunders* (for the prisoner Gray.)—This is an indictment which charges a joint receiving, whereas the evidence proved a separate receipt by each; and *R. v. Messingham* (2 Moo. C. C. 257), decides that, unless a joint receiving is found, both cannot be convicted. [JERVIS, C. J.—But one may, and the question is which.] That must be decided by the court. [JERVIS, C. J.—It cannot depend upon mere caprice; and in *Messingham's case*, I think the court acted on the rule that, as soon as the averment was satisfied by proof of a separate receipt by one, no further evidence was admissible to prove a separate receipt by the other; and so that other was entitled to be acquitted.] There was no venue laid in the indictment in *R. v. Martin* (1 Den. C. C. 398); *R. v. Webb* (*ib.* 338.) [JERVIS, C. J.—We can only dispose of the points reserved.] This goes to the jurisdiction of the court below. [CRESSWELL, J.—Brook is in Hampshire; so that the evidence shows that the man's offence was committed within the jurisdiction. ERLE, J.—This point, however, was not made at the trial.] Then the case rests upon the other point.

JERVIS, C. J.—According to the principle which seems to have been acted upon in *Messingham's case* (*b*), the allegation having been satisfied by evidence of a separate receipt by Dovey, the evidence affecting the woman ought not to have been left to the jury.

#### *Conviction of Gray reversed.*

(*b*) In *Messingham's case*, the indictment being, that John and Mary M. feloniously received stolen meat; the evidence was, that John first received in the absence of Mary. It was objected at the trial that Mary could not be legally convicted jointly with John, upon this indictment: first, because the offence of John was complete before Mary took any part in the transaction; and secondly, because she did not receive the meat of an unknown thief, as alleged in the indictment, but of her son (John). The question for the opinion of the judges was, whether Mary was properly convicted.

This case was considered at a meeting of all the judges (except Parke, J.), in Easter Term, 1830; and they were unanimous that, on the joint charge, it was necessary to prove a joint receipt; and, as the mother was absent when the son received, it was a separate receipt by him, consequently, the mother's conviction was held improper.

REG.  
P.  
W. DOVEY AND  
E. GRAY.  
—  
1851.  
—  
Joint receiving  
—Evidence.

## COURT OF CRIMINAL APPEAL.

*January 18, 1851.*(Before JERVIS, C. J. ; PATTENSON, J. ; CRESSWELL, J. ; ERLE, J. :  
and MARTIN, B.

REG. v. WELCH.(a)

*Counterfeit coin—What an uttering.**Upon an indictment which charged an uttering and putting off of counterfeit coin, the evidence was, that the prisoner went into a shop and asked to purchase some articles, putting down a counterfeit shilling in payment. The shopkeeper said it was a bad one ; and the prisoner then left the shop, without the shilling or the goods.**Held, that he was guilty of uttering.*

THE prisoner was convicted at the Quarter Sessions of the peace for the North Riding of Yorkshire, on the 31st December, 1850; and the following case was stated for the consideration of the judges. The indictment charged the prisoners with having uttered and put off, but not with having tendered to one Benjamin Dunning, a counterfeit shilling. The evidence proved that the prisoner went into the shop of Dunning, and asked to purchase some coffee and sugar, and in payment of the same he put down on Dunning's shop counter the counterfeit shilling in question, when Dunning took it up, and said to the prisoner that the shilling was a bad one. The prisoner then left Dunning's shop, leaving the shilling, but without the coffee and sugar. The prisoner was found guilty and sentenced to be imprisoned and kept to hard labour for two calendar months, but execution of the sentence of hard labour was respited for one month. The prisoner is in gaol for want of bail to render himself in execution. The recorder requested the opinion of the judges whether the charge of having "uttered and put off" was proved by this evidence. No counsel was instructed to argue the case; but the above named judges having conferred upon the case, judgment was delivered by

JERVIS, C. J.—The objection here is that the counterfeit coin was offered to a party who refused to take it. The prisoner offered it, and on being told that it was bad, ran away; and the indictment charges him with *uttering and putting off* only, not with *tendering* the counterfeit money. But that is not necessary; many cases have settled the law, that a man who knowingly offers counterfeit coin for the purpose of putting it in circulation, is guilty of uttering, whether it is accepted or not by

(a) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

the party to whom it is offered. The evidence, therefore, in this case was sufficient, and the conviction is right. REG. v. WELCH.

CRESSWELL, J.—There is, I recollect, a strong case upon this point in regard to the uttering of a forged instrument. (a)

Conviction affirmed.

1851.  
Counterfeit coin  
—Uttering.

## COURT OF CRIMINAL APPEAL.

December 20, 1850.

(Before POLLOCK, C. B., WIGHTMAN, J., WILLIAMS, J.,  
TALFOURD, J., and MARTIN, B.)

REG. v. ARTHUR FERRALL. (b)

*Indictment for disobedience to order of sessions—Bastardy order—Criminal matter—Soldier—Mutiny Act—Exemption from arrest.*

*Disobedience to an order of justices adjudging a man to be the putative father of a bastard child, and ordering him to pay a weekly sum for its maintenance, is "a criminal matter" within the meaning of sect. 52 of the Mutiny Act (12 & 13 Vict. c. 10); and a soldier, therefore, is liable to be indicted, convicted, and punished for disobeying such an order, notwithstanding that section.*

**T**HIS was a case reserved by the Recorder of Maidstone.

### CASE.

At the Quarter Sessions for the borough of Maidstone, held before me, as recorder, on the 12th of October, 1849, Arthur Ferrall, sergeant of Dragoons in Her Majesty's service, at Maidstone, was tried for disobeying an order of two justices of the borough, made in petty sessions on the 20th of July, 1849, whereby they adjudged the defendant to be the putative father of a bastard child, born on the 23rd of April, 1846, of Ann Kennard, and ordered him to pay to her the sum of 1s. 9d. per week from the 11th of July, 1849, together with the costs of the order. Case.

The order was made under the Act for the Amendment of the Poor Law (7 & 8 Vict. c. 101, s. 3.) The order was duly served, and, on the 23rd of August, 1849, Ann Kennard demanded payment of the amount then due, and the defendant refused, and said he did not intend to pay or to obey the order. Upon that refusal

(a) The case alluded to is *R. v. Radford* (1 Den. C. C. 59; 1 Cox C. C. 168), in which it was held that the exhibition of a forged receipt to the party with whom the prisoner is claiming credit on account of that receipt is an uttering to that party, although the prisoner never voluntarily parts with the possession of it.

(b) Reported by A. BIRTLESTON, Esq., Barrister-at-Law.

REG.  
v.  
A. FERRALL.

1850.

*Jurisdiction—  
Mutiny Act—  
Disobedience of  
bastardy order.*

no further proceedings under the act or the order were taken, but the defendant was charged with, and indicted for, a misdemeanor in not paying the sum due as required by the order.

The indictment in the first count, after reciting the order, charged, "That the said order of the said 20th of July, 1849, was duly served upon the said Arthur Ferrall, and he was required to obey the said order; but the said Arthur Ferrall, soldier, upon being so served with the said order as aforesaid, and being so required to obey the same as aforesaid, did not pay unto the said Ann Kennard, the mother of the said bastard child (she being then living, of sound mind, and not in any gaol or prison, or under sentence of transportation) the sum of 1*s.* 9*d.* per week from the said 11th of July then instant, the said child being then and still living, and under the age of three years, and the said Ann Kennard then and still being a single woman; neither did the said Arthur Ferrall pay to the said Ann Kennard the sum of 9*s.* 6*d.*, the costs mentioned in the said order, as by the said order he was required, but, on the contrary thereof, he the said Arthur Ferrall then and there unlawfully and contemptuously did neglect and refuse so to do, and he hath not since complied with the said order, or any part thereof, although often required so to do, in contempt, &c., and against the peace, &c.

Case.

The second count charged, "That the order of the said justices hereinbefore mentioned having been duly served, to wit, on the 20th day of July, 1849, aforesaid, afterwards, to wit, on the 23rd day of August, 1849, and after the expiration of one calendar month from the making of the said order, the said child being then living, and the said Ann Kennard, the mother, being then still living, &c., she the said Ann Kennard did personally demand of the said Arthur Ferrall payment of the sum of 10*s.* 6*d.* then due and owing for six weeks' maintenance of the said bastard child, being at the rate of 1*s.* 9*d.* per week from the said 11th day of July, 1849, and also the sum of 9*s.* 6*d.*, the amount of costs mentioned in the said order, in obedience to the said order; but the said Arthur Ferrall, of, &c., soldier, upon such demand, and being so then and there required to make such payment as aforesaid, did not pay the said sums, or either of them, or any part thereof, as by the said order he was required, but, on the contrary, he unlawfully and contemptuously did neglect and refuse so to do, and he hath not since complied with the said order, or any part thereof, although often required so to do, "in contempt, &c., and against the peace," &c.

At the trial evidence was given of the service of the order, and the demand and refusal of payment. The prisoner was undefended by counsel; but referred to the 52nd section of the Mutiny Act (12 & 13 Vict. c. 10, s. 52), whereby it is enacted that no prisoner enlisted in Her Majesty's service shall be liable to be arrested or taken therefrom by reason of any warrant of any justice or other process for not supporting, or leaving chargeable any wife or child, legitimate or illegitimate, or by any process or execution whatso-

ever (except upon affidavit of debt exceeding 30*l.*, &c.), other than for some criminal matter.

I directed the jury that, if they were satisfied with the evidence they should find the prisoner guilty; and mentioned that, if it should become necessary, I should take the opinion of the judges upon certain questions of law in the case. The jury returned a verdict of guilty, and I respited the judgment till the next sessions, taking bail for the prisoner's appearance.

The questions in this case, which I reserved, and which I beg to submit to your lordships' determination, are, first, whether the indictment can be sustained; and, secondly, whether, if it can, a sentence of fine or imprisonment, or both, can be effectually carried into execution against the defendant, a soldier, having regard to the provisions of the act 12 & 13 Vict. c. 10, s. 52.

This case was argued on Wednesday, November 20, before the above-named judges.

*Welsby* for the prisoner.—There are two questions here. First, can the indictment be sustained? If the prisoner were not a soldier, it would be difficult to contend that an indictment would not lie against him for disobeying this order of justices, although it is only an order for the payment of money; but the 52nd section of 12 Vict. c. 10 (the Mutiny Act of 1849), places this defendant in a different position. It provides "that no person whatever enlisted into Her Majesty's service as a soldier shall be liable to be arrested or taken therefrom, by reason of the warrant of any justice or other process, for not supporting, or for leaving chargeable on any parish, township, or union, any wife, or any child or children, legitimate or illegitimate, &c.; and no person enlisted as a soldier, &c. shall be liable to be taken out of Her Majesty's service by any process, order, or execution, issued out of or from any county or inferior court, &c. or by any process or execution whatsoever, *other than for some criminal matter*, unless there shall be an affidavit that the original debt amounts to £30 at the least." Now the object of this enactment is clear. The Queen is not to be deprived of the services of her soldiers, except for some criminal matter. [POLLOCK, C.B.—Is not this a criminal matter? That gives rise to the question whether an indictment will lie in any case for disobeying such an order as this. Is a man indictable for not paying a fine? TALFOURD, J.—If the indictment will lie, this is a criminal matter.] "Criminal matter" in this statute does not mean any matter for which an indictment will lie, but a matter *criminal* in the popular sense of that word. Sect. 81, explains the sense in which it is used, by enacting that "nothing in this act shall be construed to extend to exempt any officer or soldier from being proceeded against by the ordinary course of law; and that if any commanding officer shall neglect or refuse, on application being made to him for that purpose, to deliver over to the civil magistrate any officer or soldier under his command *accused of any crime or offence against the person, estate, or property of any of Her Majesty's subjects, which*

REG.  
v.  
A. FERRALL  
1850.  
Jurisdiction—  
Mutiny Act—  
Disobedience of  
bastardy order.

Argument of  
*Welsby* for the  
prisoner.



REG. *is punishable by the well known laws of the land," &c., such officer*  
 v. shall, upon conviction, be deemed to be cashiered. An attachment  
 A. FERRALL. out of Chancery for non-payment of money has been held not a  
 1850. criminal matter under the Habeas Corpus Act. (c) No difficulty  
*Jurisdiction—* arises from the use of the word "process" in the statute; because  
*Mutiny Act—* an award of execution of the judgment upon this indictment  
*Disobedience of* would be process. [WIGHTMAN, J.—But why must the judgment  
*bastardy order.* necessarily be one of imprisonment?] It need not necessarily;  
 but it may. [WIGHTMAN, J.—If imprisonment should follow, then  
 the question will arise.] No; if the proceeding may result in  
 imprisonment, and so the Queen may be deprived of a soldier, the  
 court will stop it *in limine*. [TALFOURD, J.—When the sen-  
 tence is passed he may have ceased to be a soldier.] The court  
 will presume the continuance of the existing state of things.  
 [MARTIN, B.—Could the prisoner be discharged on his own  
 application by reason of privilege?] Yes; persons have been  
 so discharged by judges at chambers. The 52nd section provides,  
 that any person showing himself to be duly enlisted, is entitled to  
 go to the court from which the process, under which he has been  
 arrested, issued, and demand his discharge. [WILLIAMS, J.—  
 Suppose this conviction to stand, I cannot see how the statute is  
 infringed. WIGHTMAN, J.—He may never be imprisoned at all.]  
 But he is liable to be arrested at any moment, and taken out of  
 the Queen's service in order to receive judgment, whether of fine  
 or imprisonment. [TALFOURD, J.—Then if he was liable *ratione*  
*tenure* to repair a highway, he could not be indicted; nor can he  
 be sued in the County Court, because imprisonment may be the  
 consequence.] Imprisonment is not the natural consequence of a  
 suit in that court, any more than it is in the Superior Courts;  
 but the natural and necessary result of this conviction is the  
 defendant's arrest.

No counsel were instructed on the part of the prosecution.

*Cur. adv. vult.*

Judgment.

POLLOCK, C. B. now delivered the judgment of the court.—  
 This was an indictment against the defendant for disobeying the  
 order of two justices, adjudging him to be the putative father of a  
 bastard child, and ordering him to pay to the mother a weekly  
 sum for its maintenance; and, upon considering the case, we are  
 of opinion that the conviction is right. Speaking, however, for  
 myself as an individual member of the court, I cannot help saying  
 that it seems to me very odd that disobedience to an order of  
 sessions for payment of money should subject the party to an  
 indictment, when there is no such remedy for enforcing the orders  
 of any other court. But this point appears to have been so long  
 settled by decided cases, that I feel myself compelled by the  
 authorities to concur with the majority of the court, and I do not  
 think it probable that if the case were postponed for the con-  
 sideration of a larger number of judges, any different result

(c) See *Lewis v. Morland* (2 B. & A. 56), and cases there cited; and *Cobbett v. Stowman* (19 L. J. Exch. 270); *Huntley v. Luscombe*, 2 Bos. & P. 530; *Re Eaton*, 9 Dowl. 207.

would be arrived at. The prisoner is now out on bail, but he may be brought in to receive judgment at the next sessions; and there is nothing to prevent that court from inflicting an imprisonment of four, six, or eight months upon him, although the statute (7 & 8 Vict. c. 101, s. 3) expressly provides that, in case of neglect to pay, in obedience to the order, the party may be committed to the common gaol for a period not exceeding three months.<sup>(a)</sup> With respect to the other point, that the prisoner is a soldier, we are of opinion that the disobedience of the order is a criminal matter, and that as criminal matters are expressly excepted from the operation of sect. 52 of the Mutiny Act, a soldier is not exempted from liability to be indicted and convicted for this offence.

REG.  
v.  
A. FERRALL.  
1850.  
Jurisdiction—  
Mutiny Act—  
Disobedience of  
bastardy order.

*Conviction affirmed.*

## COURT OF QUEEN'S BENCH.

June 8, 1850.

REG. v. CUTTS.<sup>(b)</sup>

*Perjury—Indictment—Averment of materiality.*

*An indictment for perjury alleged that one E. S. had filed a bill in Chancery against the defendant, J. C., and others, wherein he prayed that the defendant, J. C., might answer the premises; that a purchase by J. C. of certain property belonging to the other defendants might be declared fraudulent and void; and that it then and there became a material question whether the said J. C. did advise the said other defendants that the said property should be sold; and that the said J. C. falsely and corruptly swore, and in and by his answer denied, that he had so advised.*

*Held, bad in arrest of judgment, for want of a sufficient averment of materiality.*

**T**HIS was an indictment for perjury, tried in Middlesex during the sittings after Trinity Term, 1849, when a verdict of guilty was found.

(a) The enactment is: "And in case such putative father neglect or refuse to make payment of the sums due from him under such order, &c., such two justices may by warrant, &c., direct the sum so appearing to be due with costs, to be recovered by distress and sale of the goods and chattels of such putative father, and may order such putative father to be detained and kept in safe custody until return can be conveniently made to such warrant of distress, unless he give sufficient security, &c. but if, upon the return of such warrant, &c., it appear that no sufficient distress can be had, then any such two justices may, if they see fit, by warrant, &c., cause such putative father to be committed to the common gaol or house of correction for the county, &c., there to remain without bail or mainprize for any term not exceeding three calendar months, unless such sum, &c. be sooner paid."

(b) Reported by A. BITTLESTON, Esq., Barrister-at-Law.

RGO. v. CUTTS.

1850.

Perjury—  
Indictment.

The indictment alleged that, before the committing of the offence thereinafter mentioned, one Edmund Salmon exhibited and filed his bill in Chancery against John Cutts, Joseph S. Salmon, and John Salmon, wherein he prayed that the said John Cutts might answer the premises, and that a purchase by the said John Cutts of certain property belonging to the Salmons might be declared fraudulent and void, and that he might be decreed to deliver up the contract, in order that it might be cancelled, and that a certain lot might be resold under the direction of the court. The indictment then averred *that it then and there became a material question* whether the said John Cutts did advise the said J. S. Salmon, J. Salmon and Edmund Salmon, that certain real residuary estate devised to them by the will of one Smith, and including the hereditaments and premises in the said bill described, should be sold, and whether he caused the same to be put up to auction, whether he interfered in the sale, and whether he communicated with the auctioneer as to the lotting; that the defendant, the said John Cutts, put in his answer and falsely and corruptly swore, and in and by his said answer denied, that he had advised the Salmons that the testator's real residuary estate should be sold, &c.; that any of the particulars relative to the sale, were under his direction, or that he communicated with the auctioneer as to the lotting.

Argument.

A rule *nisi* in arrest of judgment having been obtained, *Knowles* and *Prentice* now showed cause.—The materiality of the false statement sufficiently appears. No express averment is necessary if the court can collect from the whole indictment that the false statement must have been material to the issue: (*Stark*, Cr. Pl. 115.) The prayer of the bill shows that it was a material question to ascertain whether the defendant advised the sale; but at all events the averment of materiality in the indictment is sufficient; the only objection is the omission of the words “in the said suit;” for if the indictment alleged that the question became material *in the suit*, no question could have arisen. Here that omission is helped by the words “then and there,” which means “thereupon,” or on the occasion of filing the bill, and also by the reference to the premises as being described in the bill. *R. v. Bartholomew* (1 Car. & Kir. 366) was a different case. It was there consistent with the indictment that the statement might not have been material to the inquiry. This is after verdict; and the court will not arrest the judgment, unless the indictment is clearly bad: (*R. v. Bignall*, 2 Russ. on Cr. 639.)

Judgment.

Sir *J. Jervis* (Attorney-General), *contra*, was not called upon. LORD CAMPBELL, C.J.—I am of opinion that the judgment ought to be arrested. An indictment for perjury must either show that the evidence alleged to be false was necessarily material to the issue, or there must be a positive averment that it was material. In this case, I think it impossible to say that the false statement in the answer must necessarily have been material in the Chancery suit. If the bill had been set out, we might perhaps have seen that it was material, because I

think that we should be bound, as common law judges, to take notice of the principles upon which Courts of Equity proceed, though not of their practice; but as this indictment is actually framed, though it appears that the bill sought to set aside the contract as fraudulent, it does not show that the advice given by John Cutts to the Salmons was at all material in that suit. Therefore we must see whether there is any sufficient averment of materiality. It is said that there is, because the words "then and there" may mean thereupon, and so involve an allegation that it was material in the suit; but the words *then and there* are the ordinary formal words, the *adtunc et ibidem* of the old precedents, referring to the marginal venue; and what authority have we to introduce into the indictment any other words? I am therefore of opinion, that there is no averment that the statement was material in the suit; and if not, then whether it was false or not, the indictment cannot be sustained.

PATTESON, J.—There might be very good reasons for setting aside the sale as fraudulent, quite independently of any advice being given by the defendant Cutts; and that being so, the question is, whether there is a sufficient averment of materiality; and I think that the words *then and there* cannot supply the omission of the words "in the said suit," or words to the same effect.

COLERIDGE, J. (c) concurred.

*Judgment arrested.*

(c) Erle, J., had left the court during the argument.

REG. v. CUTTS.

1850.

Perjury—  
Indictment.

## CENTRAL CRIMINAL COURT.

JUNE SESSION, 1850.

(Before the RECORDER.)

REG. v. LAWRENCE.(a)

7 &amp; 8 Geo. 4, c. 29, s. 23—Stealing a deed—Taking.

*The prisoner applied to a clerk of the prosecutor to procure him a deed which was in the possession of the latter. The clerk promised that he would do so, but he told his master of the request that had been made to him, and by his direction, he gave the prisoner the deed.*

*Held, that if the clerk gave the deed into the prisoner's hands the indictment could not be sustained, but that if the clerk put down the deed and the prisoner took it up, the evidence was sufficient under an indictment on the above statute, for stealing the deed.*

THE prisoner was indicted under the 7 & 8 Geo. 4, c. 29, s. 23. There were also counts for conspiring with other persons unknown.

It appeared from the evidence that the prisoner was tenant of some premises which he held under a lease for twenty-one years from the prosecutor. The lease was in the possession of the prisoner, and the counterpart in that of the prosecutor. The prisoner met the prosecutor's clerk, and told him that if he would get for him the counterpart of the lease he would give him 10*l.*; he said he had altered the lease in his possession, so as to make it appear to be for seventy-one years instead of twenty-one, and he wanted the counterpart that he might alter it in the same way.

The clerk expressed himself willing to comply with the request, but he communicated the facts to the prosecutor, and, acting under his directions, he took the counterpart of the lease, and having met the prisoner by appointment at a public-house, he gave him the document, and the prisoner immediately gave him 10*l.* It did not appear very clearly from the evidence whether the deed was given into the hands of the prisoner by the clerk, or whether it was put down on the table and taken up by the former.

*Ballantine* (for the prisoner), submitted that there was no taking sufficient to constitute a stealing of the deed. Stealing in misdemeanor involved the necessity of the same proof as in felony. The deed was actually delivered to the prisoner in this instance with the concurrence of the owner, and, therefore, in this view of the case, whether he took up the deed or it was placed in his hands, would seem to be immaterial.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

The RECORDER.—Is it quite clear that a taking in misdemeanor must be the same as a taking in larceny? The words of the section are “if any person shall *steal* any paper,” not “steal, take, and carry away.”

*Ballantine* quoted *Reg. v. Johns* (7 C. & P. 324.) There it was held, upon an indictment on the same section, that although the offence was a misdemeanor, the jury must be satisfied that the defendant took the deeds under such circumstances as would have amounted to larceny, if they had been the subject of such an offence.

*Clarkson*, with whom was *Bodkin*, for the prosecution. — In *R. v. Eggington* (2 B. & P. 508) a servant had been solicited to become an accomplice in robbing his master's house, and having communicated with the master, by his direction, he opened the door, let in the thieves, and took them to a place in which property had been laid, in order that they might take it. All this was done with a view to the prisoners' apprehension, but it was held that the taking the property under such circumstances was a larceny. This was a very strong case, for the master not only gave the prisoners ready access to his house, but gave them every facility for taking away his property. So in *R. v. Williams* (1 C. & K. 195,) where a servant, under similar circumstances, placed money on a counter by his master's direction, and the prisoner took it up, it was held that there was a sufficient taking.

The RECORDER.—But in those cases there was an actual taking by the prisoner, the owner of the property consented that the opportunity of taking should be afforded, but he did not consent to be robbed.

*Bodkin* contended that it was immaterial how the property got into the prisoner's possession. The moment he obtained it from the servant, the larceny was complete, for the master never intended to part with it to the prisoner on the terms on which he desired to obtain it. The procuring a delivery by fraud was in law a trespass.

*Ballantine* submitted that the cases cited were entirely different from the present one. Here the master not only consented to the trespass, but he prevented the prisoner from committing one, by ordering the deed to be delivered to him. There was no actual fraud which induced the master to deliver the deed to him, for he knew all the circumstances and voluntarily gave it up. In *R. v. Johnson* (C. & M. 218), it was held, that if a servant, pretending to agree with a robber, open the door and let him in, for the purpose of detecting and apprehending him, it was no burglary, for the door was lawfully opened.

The RECORDER.—Was there not a case before me some time since in which this question was discussed?

*Metcalf* (*amicus curiæ*), stated that probably the case was *Reg. v. Simmons*. There the prisoner was charged with stealing gold lace, and it appeared in evidence that the property was laid upon the counter and taken up by the prisoner, and his lordship

REG.  
v.  
LAWRANCE.

1850.

Stealing a deed  
—Evidence.

REG.  
v.  
LAWRANCE.  
—  
1850.  
—  
*Stealing a deed*  
— *Evidence.*

held, on the authority of *R. v. Williams*, that there was sufficient proof of the larceny.

The RECORDER.—I think it would be carrying the doctrine, as to larceny, too far to say, that in this case there is a sufficient taking proved. The deed is got out of the owner's possession by his servant, and he, by the master's consent, gives it to the prisoner. There is something more than rendering facility to the commission of the offence, for it appears probable that the deed was delivered into the prisoner's hands. At least, it must be so taken, for there is no evidence to the contrary. In *R. v. Eggington*, it was held that where a servant had, by his master's directions, opened the door to admit the thieves, they could not be found guilty of burglary. I shall, therefore, direct the jury that, unless they are satisfied that the clerk did not deliver the deed into the hands of the prisoner, it will be their duty to acquit him. If the deed was laid by the clerk on the table and taken up by the prisoner, then I think he might be found guilty.

*The prisoner was acquitted on the count for stealing, but found guilty on those which charged a conspiracy.*

*Clarkson and Bodkin* (for the prosecution.)

*Ballantine* (for the defence.)

## CENTRAL CRIMINAL COURT.

AUGUST SESSION, 1850.

(Before the COMMON SERJEANT.)

August 21.

REG. v. HARRIS. (a)

*Depositions—Illness of witness—11 & 12 Vict. c. 42, s. 17.*

*A witness, who had been examined before the magistrate, came up five miles from the country and gave her evidence before the grand jury. She went back at night and returned in the morning for two days, during which she was waiting for the trial to come on. At the trial, on the third day, it was proved that she had been attacked that morning with a bowel complaint, and that when the policeman left her residence early on that day she was unable to travel.*

*Held, that her deposition was not admissible.*

THE prisoner was indicted for larceny. A material witness for the prosecution being absent, it was proved, for the purpose of having her deposition read, that she had come up from Hounslow and had gone before the grand jury on the first day

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

of the session; that she went back at night and returned in the morning for two days, expecting the trial to come on, but that on the morning of the trial she had been seized with a bowel complaint, and when the policeman left Hounslow she was unable to travel.

*Carter* (for the prosecution), submitted that he was entitled on this evidence to have the deposition read.

*Ballantine* (for the prisoner) contended that the evidence was insufficient to justify such a course. A mere casual illness of this kind could never be what the statute contemplated. The woman had been travelling for the last two or three days, and in the evening—nay, at that very time, she might be able to travel again. The statute was often productive of great injustice by depriving prisoners of the benefits of cross-examination, and it was only in cases of absolute necessity that it should be resorted to.

*Carter* (in reply) said the words of the act were clear, and a deposition might be read if a witness was so ill as not to be able to travel. It was proved that she was so that morning, and, therefore, that she could not be present in court now.

The COMMON SERJEANT.—I do not think I should be justified in admitting this deposition. I am not satisfied that the witness is so ill as to be unable to travel.

*Evidence rejected.*

*Carter* (for the prosecution.)

*Ballantine* (for the defence.)

REG. v. HARRIS.

1850.

*Practice—  
Deposition of  
absent witness.*

## CENTRAL CRIMINAL COURT.

AUGUST SESSION, 1850.

• (Before Mr. COMMISSIONER GURNEY.)

August 21, 1850.

REG. v. HARNEY. (a)

11 & 12 Vict. c. 42, s. 17—*Depositions—Illness of witness.*

*A witness who had been examined before the magistrates was proved at the trial to have been delivered of a child a week before that day, and that she was unable to travel.*

*Held, that under the 11 & 12 Vict. c. 24, s. 17, her deposition might be read.*

THE prisoner was indicted for uttering counterfeit coin. During the trial, it appeared that a material witness for the prosecution had been delivered of a child a week before, and that she was now unable to travel.

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.



REG.  
v.  
HARNEY.  
—  
1850.  
—  
Practice—  
*Deposition of  
absent witness.*

*Ellis and Bodkin* (for the prosecution) tendered her deposition in evidence.

*Payne* (for the prisoner) contended that it was not admissible. 'This was not a case to which the act of parliament was intended to apply. The prosecutor knew the state in which the witness was, and the ends of justice might have been met by a postponement of the trial. It was not like a case where the illness might be permanent. Here there was a reasonable certainty that in a few weeks the woman might appear and give her evidence. If the deposition were admitted in such case as this, every slight temporary sickness might be made an excuse for reading a witness's deposition.

MR. COMMISSIONER GURNEY.—I do not see how I can shut out this evidence. It appears to me that every requisition of the act of Parliament is complied with. I find that at the time of trial the witness is too ill to travel. That is proved substantially, and we have the fact (which itself would be almost conclusive) that she was confined only a week ago. *Deposition read.*

*Ellis and Bodkin* (for the prosecution.)

*Payne* (for the defence.)

## CENTRAL CRIMINAL COURT.

OCTOBER SESSION, 1850.

(Before the COMMON SERJEANT.)

October 22.

REG. v. ULMER AND HOOPER.(a)

11 & 12 Vict. c. 42, s. 17—*Illness of witness—Deposition.*

*A witness who had been examined before the magistrates was proved, at the trial, to have been in bed the night before with a cold and inflammation, and that on a person calling at his house that morning, he had been told that he was very bad.*

*Held, that the deposition could not be read.*

THE prisoner was indicted for uttering counterfeit coin. A person of the name of Homewood had been examined before the magistrate, and at the trial a constable made the following statement:—I saw Homewood last night about nine o'clock; he

(a) Reported by B. C. ROBINSON, Esq., Barrister-at-Law.

was in bed. I believe he is not well enough to be here to day. He has had a cold and inflammation, I saw a medical man call upon him a day or two ago. I believe he has been in bed two or three days. I saw him about ten o'clock, three days ago, in the tap room, and I believe he then went to bed. He was sitting, and was unable to stand. He appeared very unwell indeed. I inquired this morning, and heard he was very bad.

REG.  
v.  
ULMER AND  
HOOPER.  
—  
1850.  
—  
*Practice—  
Deposition of  
absent witness.*

*Bodkin* and *Clerk* (for the prosecution), tendered the deposition of the witness as evidence.

*Parry* (for the prisoner), contended that the evidence was not admissible. It might be that the witness was quite well at the present time, and that he might have been produced in court. If depositions were lightly received, it would open a wide field to the greatest frauds. All a witness would have to do would be to go to bed the night before a trial which he did not wish to attend, and by complaining of illness, he might escape the consequences of a cross-examination. The court must be satisfied that the illness was a *bonâ fide* one. Here there was no proof of illness whatever.

*Bodkin* said, the question was, whether the court was satisfied, by reasonable evidence, that the witness was unable to appear to give his testimony. He was ill three days ago, so as scarcely to be able to stand. A medical man had attended him, and he was ill in bed last night. Might not the court reasonably infer from that evidence that he was, at the time of the trial, so ill as not to be able to travel?

The COMMON SERJEANT.—I cannot say that my mind is convinced, by this evidence, that the witness is not now able to travel.

*Deposition rejected.*

*Bodkin* and *Clerk* (for the prosecution.)

*Parry* (for the defence.)

## Ireland.

## COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 1850.

November 25.

REG. v. MCATAVY AND McNALLY. (a)

*Practice—Murder—Bail—Order of judge of assize.**Where a judge of assize, who has the facts before him, orders a prisoner, against whom an indictment for murder is pending, to be detained in custody, it is against the practice of this court to reverse that order.*

**THIS** was an application that the prisoners, McAtavy and McNally, who were in custody upon a charge of murder, should be admitted to bail. It appeared that, at the last assizes for the county of Armagh, the prisoners, together with one Hanratty, being in custody upon a charge of having murdered Mr. Mauleverer, the Attorney-General (Monahan) placed Hanratty upon his trial; the jury having found a verdict of not guilty, the other two prisoners then applied either to be tried or admitted to bail. The Attorney-General resisted the application, and Mr. Justice Moore, who had tried the case, refused the application, and made an order that the prisoners should be detained in custody.

*O'Hagan, Q. C.* in support of the motion.—As no particular reasons were suggested by the law officers of the Crown for detaining the prisoners in custody, they ought to be admitted to bail, the matters in question between the Crown and the prisoners having been substantially tried already in the case of Hanratty, the informations and depositions against whom form the evidence against the other prisoners. The court will consider the merits of the case, as bearing on the material question, whether there is a reasonable probability of the prisoners appearing to take their trial.

**BLACKBURN, C. J.**—The learned judge who tried the case having declined to admit the parties to bail, I do not see how the court can interfere.

*O'Hagan.*—The court has an inherent jurisdiction to interfere in a criminal matter.

**BLACKBURN, C. J.**—But counsel applies to the court to exercise

(a) Reported by W. ST. LEGER BABINGTON, Esq. Barrister-at-Law.

its discretion and make an order which has been refused by the learned judge who had the facts fully before him.

*O'Hagan.*—Mr. Justice Moore did not go into the merits of the case; but refused to admit the prisoners to bail because the Attorney-General objected to it.

PERRIN, J.—I think that the proper course would be to apply for a revision of the rule made by the learned judge who had tried the case.

CRAMPTON, J.—I apprehend that the recollection of my learned brother Perrin, as to the practice of the court, is correct; in addition to which, it is the rule of the court, that where persons are in custody on an indictment for murder, which has not been tried, the court will not, unless under very peculiar or coercive circumstances, interfere.

*O'Hagan.*—The application is made to this court as a superior tribunal to that by which the mistake has been made, which it is sought to rectify.

PERRIN, J.—I very much doubt the jurisdiction of this court to entertain an appeal from the order of a judge of assize presiding in a criminal court; there are several instances in which the court has refused such applications, on the ground that the order had been made by a judge who had the facts before him.

THE COURT were all strongly of opinion that it was against the practice of the court, where a judge below has made an order that a prisoner be detained in custody, to reverse that order, and accordingly made

*No rule upon the motion.*

REG.  
v.  
MCATAVY AND  
MCNALLY.  
—  
1850.  
—  
*Practice.*

## Ireland.

### COURT OF QUEEN'S BENCH.

November 7, 1850.

REG. v. P. E. HUGHES.(a)

#### *Practice—Copy of Indictment—Embezzlement.*

*Where the application is opposed by the Attorney-General, the court will not order a party indicted for embezzlement to be furnished with a copy of the indictments found against him, though they are very voluminous, and contain a great many counts, but Semble, that in such case the court will order the accused to be furnished with a full bill of particulars.*

IN this case two indictments for embezzlement having, at the Commission of Oyer and Terminer, been found against the defendant, which had been removed into this court, one by the defendant, the other by the Crown,

(a) Reported by W. ST. LEGER BABINGTON, Esq., Barrister-at-Law.

REG.  
v.  
P. E. HUGHES.  
—  
1850.  
—  
Practice—  
Copy of  
Indictment.

*Fitzgibbon*, Q. C., on behalf of the defendant, moved that he be furnished with a copy of the indictments, as they were very voluminous, and contained a great many counts.

The *Attorney-General* (*Hatchell*), with whom was PERRIN, J., opposed the application.—It was not the right of the accused to obtain a copy, and the Crown did not wish to set a precedent which might be cited on other occasions.

*Fitzgibbon* said that a copy had been given in the case of *Reg. v. Grace* (2 Cox Crim. Cas. 101), which was the case of an indictment for forgery.

BLACKBURNE, C. J.—That was the case of a private prosecution (*b.*)

CRAMPTON, J.—We cannot grant the application in this instance, where it is opposed by the Crown, unless a similar rule is to prevail in all cases.

PERRIN, J.—I regret that it is the law that the indictment should not be furnished, and it leads to delay, because the accused has afterwards a right to have the indictment read over slowly in open court.

BLACKBURNE, C. J.—The observance of precedent is of great importance.

PERRIN, J.—At the commission we have made an order for the giving a full bill of particulars.

The *Attorney-General*.—A bill of particulars will be furnished.

CRAMPTON, J.—That will give him every information to enable him to meet the case on the merits. *Motion refused.*

[The prisoner was, at the sittings after this term, tried and acquitted on one of three indictments, and on the others the *Attorney-General* entered a *nolle prosequi*.]

(*b*) In the case of *Reg. v. Grace* (2 Cox Crim. Cas. 101), above referred to, it is to be observed that a copy of the indictment was only ordered to be given to the accused (the prosecutor not objecting), and though it appeared that the indictment was of extraordinary length (see 2 Cox Crim. Cas. 101), the Court decided (*Reg. v. Grace*, 2 Cox Crim. Cas. 161), that the accused, if he desired a copy of it, should take it out at his own expense, and giving the accused every reasonable information which he requires.

## OXFORD CIRCUIT.

## WORCESTER SUMMER ASSIZES.

July 19, 1850.

(Before LORD CAMPBELL, C. J.)

REG. v. HUGHES.(a)

*Concealment of birth by disposing of the dead body—Stat. 9 Geo. 4, c. 31, s. 14.*

*A woman who places a living child in a place of concealment, and on subsequently revisiting that place finds the child dead and leaves it there, is guilty of concealing the birth of a child, by a secret disposal of the dead body, within the meaning of the stat. 9 Geo. 4, c. 31, s. 14; although she does not actually remove the body, but merely replaces the clothing or other articles with which the concealment was effected or assisted.*

THE prisoner was indicted for the murder of her infant child at Pershore in the county of Worcester, on the 5th of May, 1850.

*Selfe*, in opening the case for the prosecution, told the jury that if the evidence failed to establish the capital charge of murder, it would be competent to them to find the prisoner guilty of concealing the birth of the child. A question might arise, however, which would be one for his lordship rather than for the jury, whether there was, in fact, an endeavour to conceal the birth within the statute? (9 Geo. 4, c. 31, s. 14) namely, "by secret burying or otherwise disposing of the dead body." In this case there was no doubt that the child was alive when it was deposited in the place of concealment, but if it were shown that the prisoner visited the spot afterwards, and after the death of the child recovered it, he apprehended, under his lordship's direction, that would be a secret disposal of the dead body within the statute.

It appeared from the evidence, that the prisoner was secretly delivered of an illegitimate child on the morning of the 5th of May, 1850. In the afternoon of that day the child was discovered in an outhouse, a short distance from the dwelling where the prisoner lived as a servant. The child was alive and was concealed from view by four bundles of rick pegs lying horizontally in front and partly over it, but not touching it. The child was wrapped in an old gown and an apron. The person who discovered it left it as he found it, and the rick pegs were replaced in the same position. About an hour afterwards the outhouse was

(a) Reported by J. E. DAVIS, Esq. Barrister-at-Law.

REG.  
v.  
HUGHES.  
1850.  
Concealment of  
birth.

revisited, and the rick pegs were found to have been partially removed and placed on one side of the child, which was dead. The death was proved to have been caused by an injury on the head, but it was consistent with the evidence that that injury was caused by the accidental falling and pressure of one of the bundles of rick pegs.

There was some evidence to lead to the inference that the prisoner alone, and no other person, had been in the outhouse during the hour in which the child was left there after its discovery.

At the close of the case for the prosecution,

LORD CAMPBELL, C. J., said, the case has been fully investigated, and I am of opinion that there is not sufficient evidence to go to the jury on the charge of murder. It is quite consistent with the evidence, that the death of the child was not occasioned by the prisoner. I believe she had not any part in it. It is impossible to say how it might have been produced, whether by the ricks pressing on the head or otherwise. But with regard to the concealment of the birth, it appears to me impossible to resist a conviction for that offence. I have carefully examined the statute and the facts with reference to the point suggested by the counsel for the prosecution. Any objection that might have arisen that there was no attempt to conceal the dead body of the child, is, I think, removed in the manner suggested, for there cannot be any reasonable doubt that the prisoner visited the outhouse after the child was dead, and although she did not remove it, any replacing of the clothes or other things by which the body was concealed from view, would, I think, be an endeavour to conceal by a secret disposal of the dead body within the statute.

*Huddleston*, for the prisoner, said, as that was the opinion of his lordship, he would not resist a verdict of guilty of concealing the birth of the child.

*The prisoner was then acquitted of the capital charge and convicted of the misdemeanor.*

## OXFORD CIRCUIT.

WORCESTER SUMMER ASSIZES.

July 19, 1850.

(Before LORD CAMPBELL, C. J.)

REG. v. LOWE. (a)

*Manslaughter—Negligence.*

*An act of omission, as well as of commission, may be so criminal as to be the subject of an indictment for manslaughter.*

*Where a man, appointed to superintend a steam-engine employed in a colliery for the purpose of raising colliers from the pits, left the engine in the charge of an incompetent person, and in consequence of that incompetence, death ensued,*

*Held, that the man so leaving the engine was guilty of manslaughter.*

**T**HE prisoner was indicted for the manslaughter of Thomas Tibetts, on the 3rd of June, 1850.

From the evidence in support of the charge, it appeared that the deceased was a collier, working in coal pits, and the prisoner was employed by Messrs. Jones and Darly, the owners of the pits, to attend the steam-engine by which the "skip," or basket, was raised up or let down the shaft of the pit with the workmen, on their way from and to their work. In the case of the men ascending the pit, it was the prisoner's duty to set the engine in motion to raise the skip until it reached about two feet above the surface or mouth of the pit, and then to stop the engine, so as to allow a "waggon" or platform to be moved over the mouth of the pit, and enable the men to get out of the skip with safety. Evidence.

The prisoner, instead of attending at the engine, as was his duty, left it on the morning of the 3rd of June, 1850, in the care of John Stockley, a lad fifteen years of age. Stockley remonstrated with the prisoner at the time, and told him that he, Stockley, would not work the skip. The prisoner replied that the witness was too idle to work it, but he would make him. The prisoner then went away to a public-house.

During his absence the deceased (having descended the pit early in the morning,) made the usual signal for the skip to be drawn up, by calling out to the boy stationed at the top of the shaft, whose duty it was in his turn to repeat the signal to the person having charge of the engine. In this instance the boy

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.



REG. v. LOWE.

1850.

*Manslaughter  
by negligence.*

repeated the signal as usual, and Stockley set the engine to work, but failed in stopping it at the proper time when the skip reached the surface with the deceased and two fellow workmen. The failure was proved to be because "the skipper did not knock the engine up into the cap," Stockley stating that he did not know how to do it. The consequence was that the skip was drawn up to the pulley over which the rope connecting the skip with the engine passed, and the deceased forced out, falling down the shaft, which was 170 yards deep, and was of course killed.

At the close of the case for the prosecution,

*Huddleston*, for the prisoner, said he would take his lordship's opinion as to whether the facts, as proved, constituted the crime of manslaughter, or, in other words, whether a man whose duty it is to attend at a particular place or fill a particular office, and omits to attend, and leaves an incompetent person in his place, and death ensues, is guilty of manslaughter? In *Rex. v. Allan and Clark* (7 C. & P. 153), it was held that where a sailing vessel was run down by a steam-boat in consequence of the improper steerage of the latter, arising from there not being a man at the bow to keep a look-out at the time of the accident, neither the captain or pilot could be convicted of the manslaughter of a person in the vessel run down. Parke, J., then observed—"Supposing the captain had put a man at the proper part of the vessel and gone to lie down, do you mean to say he would be criminally responsible? And you must carry it to that length if you mean to make anything of it. And Alderson, B., said to the jury, 'There is no act of personal misconduct or personal negligence on the part of these persons at the bar.' A distinction appears to be taken between those cases where case or trespass would be, respectively, the civil remedy. In *Rex v. Green* (7 C. & P. 156), also, it was held that to make the captain of a steam-vessel guilty of manslaughter, in causing a person to be drowned, by running down a boat, the prosecutor must show some act done by the captain; and a mere omission on his part, in not doing the whole of his duty, is not sufficient. No doubt seems to have been expressed that, supposing the captain had gone down to bed, and the accident happened, that he could not have been responsible. In the present case the prisoner had gone away to a public-house."

*Huddleston for  
the prisoner.*

LORD CAMPBELL, C. J.—I am clearly of opinion that an act of omission, as well as of commission, may be so criminal as to be the subject of an indictment for manslaughter, and that there is evidence to go to the jury of such a criminal omission in this case.

*Huddleston* then addressed the jury on the question whether there was gross negligence, or, even if there was, whether the death of the deceased was caused by it.

*Verdict, Guilty.*

*W. H. Cooke and E. V. Richards* for the prosecution.

*Huddleston* for the prisoner.

## OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES.

(Before Mr. JUSTICE WILLIAMS.)

July 22, 1850.

REG. v. STOKES.

*Evidence—Practice as to putting depositions in the hands of a witness to refresh his memory—Venue in indictments where offence committed within a limited jurisdiction.*

*The depositions of a witness before a magistrate cannot be put into his hands at the trial to refresh his memory on cross-examination.*

*Where an offence, committed within a limited jurisdiction, is tried in the adjoining county, under the stat. 38 Geo. 3, c. 52, s. 2, the venue in the margin of the indictment is properly laid in the county where the offence is tried, and there is no necessity for an averment in the body of the indictment to connect the county of the city or town within which the offence is alleged to have been committed, with the venue of the county from which the jury comes.*

THE prisoner was indicted for housebreaking. On the cross-examination of one of the witnesses for the prosecution,

*Huddleston* (for the prisoner), was about to put into her hands her deposition, taken before the committing magistrate, when

*R. Kettle* (for the prosecution), objected.

*Huddleston*, submitted that the witness might look at her deposition, signed by her, to refresh her memory as to the facts. It was held, on the late Chartist trials, that the notes of a shorthand writer of what a witness said at a meeting, and read over to the witness and signed by him, might be put into his hands for the purpose of refreshing his memory.

WILLIAMS, J.—That was on the same principle as a log book is allowed to be put in the hands of the captain of a vessel to refresh his memory, being a contemporaneous entry of events which the witness superintends and controls. Here the deposition is not contemporaneous with the facts deposed to, and does not fall within the description of memoranda and entries available for the purpose of refreshing a witness's memory. I cannot, therefore, permit it to be so used. The deposition may be put in evidence to contradict the witness, if necessary.

The cross-examination of the witness was then resumed, without reference to the depositions.

At the close of the case for the prosecution,

• (a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

REG.  
v.  
STOKES.  
—  
1850.  
—  
Evidence—  
Deposition—  
Venue.

*Huddleston* objected to the form of the indictment. The indictment commenced as follows:—"Staffordshire, to wit: The jurors of our lady the Queen, upon their oath, present that Thomas Stokes, late of the parish of Stafford, labourer, on the 20th day of May, A.D. 1850, at the parish of St. Michael, in the city of Lichfield, in the county of the same city, the dwelling-house of one William Gilland, there situate, feloniously did break and enter." &c. The venue in the margin is Staffordshire; the offence is alleged to have been committed in the city and county of Lichfield, without saying that Lichfield is within the jurisdiction of this court. The statute 38 Geo. 3, c. 52, s. 2, no doubt gave jurisdiction to this court in such cases, but then the venue laid in the indictment must be the original inferior jurisdiction, and not that of the shire. That was so laid down in the case of *R. v. Mellor* (Russ. & Ry. 144), where it was held, that although under the above statute, the offence was triable in the county at large, the offence should have been laid in the county of the town.

WILLIAMS, J.—I am very familiar with indictments of this description, having drawn a great many, and I never knew the venue, under the same circumstances, laid otherwise than in the present indictment. The venue in the margin is and must be that of the county from which the jurors come who present the bill.

*The prisoner was ultimately convicted.*

## OXFORD CIRCUIT.

### STAFFORD SUMMER ASSIZES.

(Before MR. JUSTICE WILLIAMS.)

July 25, 1850.

REG. v. WOOLLEY. (a)

#### *Practice—Costs in the Court of Criminal Appeal.*

*The Court, which has been directed to pass sentence on a prisoner, after a point reserved for the decision of the Court of Criminal Appeal, has power to allow the costs incurred in the latter court, and upon taxation under an order to that effect, the briefs and fees of two counsel will be allowed.*

IN this case the prisoner had been tried and convicted at the Stafford Spring Assizes, on a charge of obtaining money by

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law. •

means of false pretences, a point was reserved for the consideration of the Court of Criminal Appeal, and after argument the conviction was affirmed: (*see ante*.) Sentence was now passed upon the prisoner in pursuance of the order of the judges of that court.

*Huddleston*, on the part of the prosecution, applied to be allowed the costs of arguing the case in the Court of Criminal Appeal.

The costs of the prosecution at the Spring Assizes, after the verdict of guilty was recorded, having been allowed in the ordinary way, he apprehended that the court would now make an order that the subsequent costs should be taxed and allowed.

WILLIAMS, J. doubted whether he could allow these costs. The statute (11 & 12 Vict. c. 78) which constituted the Court of Appeal, was silent as to costs, and the court now sitting was only directed to give the judgment. He would consider the point, and consult Lord Campbell (sitting at *Nisi Prius*) on the subject.

At the close of the circuit at Gloucester, Mr. Justice Williams intimated that the costs of the appeal should be allowed, and made an order to that effect. The costs were accordingly taxed, including the brief and fees of the two counsel (*Huddleston* and *P. M'Mahon*) who appeared in the court below and in the Appeal Court.

REG.  
v.  
WOOLLEY.

1851.

Practice—  
Costs of appeal.

[This is an important decision, for the question raised is one of considerable nicety. The statute under which the costs of ordinary prosecutions are allowed out of the county rate, is the 7 Geo. 4, c. 69, sect. 22 & 23. The court authorized by that statute to make the order, is "the court before which any person shall be prosecuted or tried," and it has been held that indictments removed by *certiorari* are not within it. (*Rez v. Richards*, 8 B. & C. 420; *Rez v. Kelsey*, 1 Dowl. 481.) It seems, therefore, that the power to order costs can only be supported by considering the court which pronounces sentence, as, in fact, the court before which the party was prosecuted or tried; but the objection to that position, in the above case at least, is, that the learned judge was directed to give the judgment by the Justices and Barons forming what is termed the Court of Criminal Appeal. He, therefore, derived his authority in this particular case from them, and not from the court before whom the prisoner was tried; and, on the other hand, his general authority was derived from a different commissioner from that under which the trial took place.—J. E. D.]

## OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES.

(Before LORD CAMPBELL, C. J.)

July 26, 1850.

*Doe dem.* BAINBRIGGE v. BAINBRIGGE. (a)*Evidence as to Insanity.—Medical witness.*

*On an issue as to the state of mind of a testator, a medical man, conversant with cases of insanity, cannot be asked his opinion as to the insanity of the testator, founded upon the evidence given at the trial in his hearing.*

THIS was an action directed by the Court of Chancery to ascertain the mental competency of a testator to make a will. Towards the conclusion of the plaintiff's case, Dr. Monroe, Dr. Conolly, and Dr. Forbes Winslow, were severally put into the witness-box, to give evidence on the question of insanity.

*Cockburn (Solicitor-General)*, on the part of the lessor of the plaintiff, who asserted the incompetency of the testator, was about to ask Dr. Monroe whether, in his opinion, from the facts proved in evidence, the testator was sane or insane.

LORD CAMPBELL, C. J. interposed, and said, the witness might give general scientific evidence on the causes and symptoms of insanity, but he must not express an opinion as the result of the evidence he had heard with reference to the sanity or insanity of the testator, his lordship saying peremptorily that he would not allow a physician to be substituted for a jury.

The *Solicitor-General* hereupon proposed in form the following question to the first witness, Dr. Monroe, for the purpose, if it should be necessary, of having its propriety determined in the court above: "Having heard the evidence in this case, are you of opinion that this gentleman was or was not of sound mind?"

*Keating, Q. C.* objected to the question.

LORD CAMPBELL, C. J. said—"I have not the slightest hesitation in overruling it;" but, at Mr. Cockburn's request, he took a note of the point.

Dr. Monroe was subsequently proceeding to state, on cross-examination, an opinion upon the facts proved in the cause, when

LORD CAMPBELL, C. J. again interposed, and requested the witness not to express any opinion upon these facts, but to confine himself to general scientific principles.

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

The jury ultimately returned a verdict for the plaintiff.  
 The *Solicitor-General* (especially retained), *Alexander, Q. C.,*  
 and *Gray*, for the lessor of the plaintiff.  
*Keating, Q. C., Whitmore, and Pigott*, for the defendant.

*Doe dem.*  
 BAINBRIGGE  
*v.*  
 BAINBRIGGE.  
 ———  
 1850.

[The ruling of Lord Campbell in this case is in accordance with the answers of the judges to the questions submitted to them in *Reg v. M'Naughten*. On the other hand, it does not interfere with the suggestion contained in the answer to the last of those questions, that (it regards criminal cases) "where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted upon as a matter of right."—J. E. D.]

—  
*Evidence—*  
*Insanity.*

## OXFORD CIRCUIT.

GLOUCESTER SUMMER ASSIZES.

August 12 and 13, 1850.

(Before Mr. JUSTICE WILLIAMS.)

REG. v. ELIZABETH BUBB.

REG. v. RICHARD HOOK.(a)

*Murder by starvation—Indictment—Practice—Finding of the grand jury—Liability of those who undertake the duty of supplying an infant with food and clothing, for neglecting to perform that duty.*

*If, upon a bill for murder against A. B. and C. D., the grand jury returns "a true bill against A. B. for murder," and "a true bill against C. D. for manslaughter," the finding is good as against A. B., and a nullity as respects C. D., and a fresh indictment for manslaughter should be preferred against the latter.*

*Where any person undertaking the duty of supplying an infant with proper food and clothing, and furnished with the means of discharging that duty properly, wilfully neglects to do so, with an intention to cause the death of the child, or to do it some grievous injury, and the child dies in consequence of such neglect, such person is guilty of murder.*

*Where the neglect is culpable only, and not malicious, such person is guilty of manslaughter.*

*Where a parent supplies sufficient food and clothing to another, for the purpose of administering to his child, and that other person wilfully withholds it from the child, and the parent is conscious that it is so withheld, and does not interfere, and the child dies for want of proper food and clothing, the parent is guilty of manslaughter.*

THE prisoners, Richard Hook and Elizabeth Bubb, having been committed for trial on a charge of murder, the follow-

(a) Reported by J. E. DAVIS, Esq., Barrister-at-Law.

REG.  
v.  
E. BUBB.  
REG.  
v.  
R. HOOK.

1851.

*Murder—  
Indictment—  
Practice—  
Evidence.*

Indictment.

ing bill for that crime was preferred against them before the grand jury:—

GLOUCESTERSHIRE, } The jurors, &c., present that  
to wit. } Richard Hook, late of, &c., labourer,  
and Elizabeth Bubb, late of, &c., widow, &c., on the 1st day of  
June, A.D. 1849, and on divers other days and times between that  
day and the 24th day of May, A.D. 1850, at, &c., in and upon one  
Maria Hook, an infant of tender age, to wit, of the age of four  
years, in the peace of God and our said Lady the Queen, then  
and there being, feloniously, wilfully, and of their malice afore-  
thought, did make divers assaults. And the jurors aforesaid,  
upon their oath aforesaid, do further present, that the said Maria  
Hook was a daughter of the said Richard Hook, and during the  
time aforesaid was residing and living with the said Richard Hook  
and Elizabeth Bubb, and was under their care and control, and  
unable to provide for or take care of herself, and that during the  
time aforesaid it became and was the duty of the said Richard  
Hook and Elizabeth Bubb to procure and provide for and give  
and administer to the said Maria Hook sufficient food, meat, and  
drink, fit and necessary for the support, sustenance and nourish-  
ment of the body of the said Maria Hook, and that during all the  
time aforesaid it became and was the duty of the said Richard  
Hook and Elizabeth Bubb to provide and procure for the said  
Maria Hook proper and sufficient clothing, and to preserve and  
protect the said Maria Hook from the cold and inclemency of the  
weather. , And the jurors aforesaid, upon their oath aforesaid, do  
further present that the said Richard Hook and Elizabeth Bubb,  
not having the fear of God before their eyes, but being moved  
and seduced by the instigation of the devil, and contriving felo-  
niously, wilfully, and of their malice aforethought, to starve, kill,  
and murder the said Maria Hook on the said 1st day of June,  
A.D. 1849, and from thence till the 24th day of May, A.D. 1850,  
at, &c., feloniously, wilfully, and of their malice aforethought, did  
refuse, neglect, and omit to give and administer to the said Maria  
Hook sufficient food, meat and drink, fit and necessary for the  
support, sustenance and nourishment of the body of the said  
Maria Hook, and during all the time aforesaid, at, &c., felo-  
niously, wilfully, and of their malice aforethought, did refuse to  
permit and suffer the said Maria Hook to have sufficient food,  
meat, and drink, necessary for the support, sustenance, and  
nourishment of the body of the said Maria Hook, and during all  
the time aforesaid, at, &c., feloniously, wilfully, and of their  
malice aforethought, did omit, refuse, and neglect to provide and  
procure for the said Maria Hook proper and sufficient clothing,  
and did, during the time aforesaid, at, &c., feloniously, wilfully,  
and of their malice aforethought, expose the said Maria Hook to  
the cold and inclemency of the weather without sufficient and  
proper clothing and covering: by means of which said refusal,  
neglect, and omission of the said Richard Hook and Elizabeth  
Bubb, to give and administer to the said Maria Hook sufficient

food, meat and drink, fit and necessary for the support, sustenance, and nourishment of the body of the said Maria Hook as aforesaid, and also by means of the refusal of the said Richard Hook and Elizabeth Bubb to permit and suffer the said Maria Hook to have sufficient food, meat, and drink necessary for the support, sustenance, and nourishment of the body of the said Maria Hook as aforesaid, and also by means of the said Richard Hook and Elizabeth Bubb omitting, neglecting, and refusing to provide and procure for the said Maria Hook proper and sufficient clothing as aforesaid, and exposing the said Maria Hook to the cold and inclemency of the weather without sufficient and proper clothing and covering as aforesaid, the said Maria Hook, during all the time aforesaid, at the parish aforesaid, in the county aforesaid, did pine and languish and became and was mortally sick, weak, diseased and distempered in her body, of which said mortal sickness, weakness, disease, and distemper aforesaid, caused and occasioned as aforesaid, the said Maria Hook, on the said 24th day of May, A.D. 1850 aforesaid, at, &c., died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Richard Hook and Elizabeth Bubb, her, the said Maria Hook, in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, against the peace, &c.

The grand jury returned the above "a true bill against Elizabeth Bubb for murder," and "not a true bill against Richard Hook for murder," but "a true bill against Richard Hook for manslaughter."

A separate bill for manslaughter was afterwards preferred and found against Richard Hook, charging him with killing and slaying Maria Hook, under the same circumstances, the indictment alleging the same facts in the same terms as above, omitting, of course, the name of Elizabeth Bubb, and the technical allegations of malice, &c.

Upon the prisoners being arraigned, the finding of the grand jury on the first bill occasioned some discussion as to its sufficiency, and as the prisoner was not defended by counsel, Mr. Justice Williams consulted Lord Campbell, C. J., sitting at Nisi Prius, and Mr. Greaves, Q. C. (who was associated with them in the commission.) They inclined to the opinion that the finding upon the joint bill was good as respected Bubb, but bad as respected Hook. Mr. Justice Williams, however, directed the counsel for the prosecution to consider the point. They referred to the following passage in Chitty's Criminal Law:—"Though the indictment may charge one with murder, and the other with manslaughter only, yet if both are accused in the higher degree, the grand inquests should return their finding against one for the capital, and the other for the inferior, offence; but in such case the bill will be good against the former, and nugatory as against the latter." (b)

(b) 3 Chitty's Criminal Law, p. 738, citing 3 Bulst. 306 (a misprint for 206.) The following is the case referred to in Bulstrode:

*The King against Sir Matthew Cary, junior, and Ferdinando Cory.*—Upon an indictment

REG.  
v.  
E. BUBB.  
REG.  
v.  
R. HOOK.  
—  
1851.

*Murder—  
Indictment—  
Practice—  
Evidence.*



REG.  
v.  
E. BUBB.  
REG.  
v.  
R. HOOK.  
—  
1851.  
—  
Murder—  
Indictment—  
Practice—  
Evidence.

Williams, J.,  
summing up.

His LORDSHIP then decided to try Bubb only upon the joint indictment, to treat it as a nullity as respected Hook; and to try him upon the separate indictment for manslaughter.

The trial of the prisoner Elizabeth Bubb then proceeded. It appeared in evidence that she was a widow with two children, and was the sister of Hook's wife, who died about two years before the trial, leaving three children, of whom the deceased infant, Maria, was the youngest. Upon the death of Hook's wife, the prisoner and her children went to live with him, and she became the manager of his household. He was accustomed to be absent from home at work, except from Saturday night until Monday morning, but he always provided ample food for the whole family. Down to the time Bubb undertook their management, Hook's children were healthy, but she systematically neglected them, especially the youngest, and notwithstanding the remonstrances of her neighbours, persisted in withholding sufficient food and clothing, for want of which the child gradually wasted away and died of actual starvation on the 24th of May, 1850.

WILLIAMS, J., in summing up, thus laid down the law on the subject to the jury:—I think it right to tell you as plainly as I can the law on the subject of this indictment, in order that you may know how to apply the facts to the law which I lay down. The indictment alleges, first, a duty on the part of the prisoner at the bar to supply the necessaries of life to the child whose death is the subject of the indictment. It alleges, secondly, a malicious neglect or omission to perform that duty; and it alleges, thirdly, that that omission or neglect resulted in the death of the child. If these three propositions are made out to your satisfaction, it will be your painful duty to find that the whole charge against the prisoner is substantiated, and you will say that she is guilty.

of murder against two. By the grand jury, *billa vera* found as to one of them, and manslaughter as to the other, how to proceed.

COKE, Chief Justice.—This is possible so to be, and it may be good; for the one may have malice, and the other not; he may come in by chance, and so kill the other, as it is in Plowden's Commentaries. And so was the truth of this case, being that Ferdinando Cary and Oseband were in the field fighting upon a quarrel, Sir Matthew Cary, casually riding by, and seeing them in fight, and his kinsman one of them, rides in, draws his sword, thrusts Oseband through, and killed him. In this case, this is clearly but manslaughter in him, and murder in the other, so is the Commentaries and *Machallye's case*, 9 pars. 65.

The whole court agreed with him herein.

Exceptions were then moved to the indictment, the same being *quod felonice, percussit*, and doth not say *ad tunc et ibidem*.

COKE.—If so, then not good.

It was then further urged that there was neither place nor time showed, *quando percussit*. But as to this it was said, that there were two *ad tunc*s and two *ibidem*s.

This held to be good by the whole court, *billa vera*, as to Ferdinando Cary.

DODDERIDGE, Justice.—He is to answer to the indictment, which is of murder.

COKE.—The best way is to have a new indictment, for that this is not good, a new indictment against Sir Matthew Cary, and this to be for manslaughter; for this finding of the jury cannot be so indorsed upon this indictment, the best way to have several indictments against them, and not one.

DODDERIDGE.—In one indictment this may be specially so set down, and well enough.

COKE, and the rest of the judges.—You cannot proceed against him by indictment upon this indorsement, but upon a new indictment. And so by the rule of the court, a new indictment was to be drawn against Sir Matthew Cary, who by the rule of the court was bailed.

Now, first, with respect to the proposition that it was the duty of the prisoner to provide food and raiment necessary to sustain the life of the child. It is quite clear that the circumstance of the prisoner at the bar being in the position of an aunt of the deceased child, or being resident in the same house with the child, was not sufficient to cast upon her the duty of providing sufficient food and raiment for it. But if the prisoner undertook the charge of attending to the child, and of taking that care of it which its tender age required, a duty then arose to perform those offices properly; and if the prisoner, being in the capacity, as it were, of servant or nurse, and having the charge of attending and taking care of the child, was furnished with the means of doing so properly, then the duty arose which is charged in this indictment, of giving it sufficient food and raiment, and if the prisoner neglected to perform that duty, beyond all question she is criminally responsible. It remains for me to explain to what extent she is responsible. If the omission or neglect to perform the duty was malicious, then the indictment would be supported, and the crime of murder would be made out against the prisoner; but if the omission or neglect were simply culpable, but not arising from a malicious motive on the part of the prisoner, then, though it would be your duty to find her guilty, it should be of manslaughter only. And here it becomes necessary to explain what is meant by the expression malicious, which is thus used. If the omission to supply necessary food or raiment was accompanied with an intention to cause the death of the child, or to cause some serious bodily injury to it, then it would be malicious in the sense imputed by this indictment, and in a case of this kind it is difficult, if not impossible, to understand how a person who contemplated doing serious bodily injury to the child by the deprivation of food, could have meditated anything else than causing its death. You will therefore probably consider that the question resolves itself into this—Did the prisoner contemplate, by the course she pursued, the death of the child? If she did, and death was caused by the course she pursued, then she is guilty of murder. But if you are not satisfied that she contemplated the death of the child, then, although guilty of a culpable neglect of duty, it would amount only to the crime of manslaughter. If, on the other hand, you should think either that she did not undertake the duty of supplying the child with proper food and raiment, or that she did not culpably neglect that duty, then you will acquit her altogether.

The jury returned a verdict of *guilty of an aggravated manslaughter*, and the prisoner was sentenced to be transported for life.

The prisoner Hook was tried the next day upon the other indictment for the manslaughter of the same child.

It appeared, however, in evidence, upon his trial, that he had always provided sufficient food and clothing for all his household; that when he was at home, Bubb treated the children better than

REG.  
v.  
E. BUBB.  
REG.  
v.  
R. HOOK.  
—  
1851.

*Murder—  
Indictment—  
Practice—  
Evidence.*

Williams, J.,  
to the jury.

REG.  
v.  
E. BUBB.  
REG.  
v.  
R. HOOK.  
—  
1851.

*Murder—  
Indictment—  
Practice—  
Evidence.*

Williams, J.,  
summing up.

on other occasions; and that he himself had uniformly behaved kindly to them, and especially to the deceased.

WILLIAMS, J., in summing up the evidence to the jury, said:— This case differs from the last in this very essential particular, that here there is a duty directly cast upon the prisoner to provide sufficient food and clothing for the child, if he has sufficient means for doing so, and, inasmuch as it is plainly proved that the prisoner had such means, there can be no doubt but that the law and the common feelings of mankind threw upon him the duty of preserving the child's life, by providing it with proper food and clothing. But the peculiarity of the case is this, that inasmuch as we must take it for granted that Elizabeth Bubb was guilty, she could not have been so, unless the prisoner had provided her with sufficient means for feeding and clothing the child, and it must be taken as an admitted fact in this case, that the prisoner did take such steps as, but for Bubb's misconduct, would have preserved the child's life. Then the question is, how is the charge shaped against the prisoner at the bar? If Bubb neglected her duty, by depriving the child of food for any purpose, and the prisoner was conscious of it, and, nevertheless, chose to let her persevere in that course, he thus became himself an instrument, as it were, of depriving the child of sufficient food and clothing, and he would be guilty upon this indictment. If, therefore, you think he was conscious that Elizabeth Bubb deprived the child of food and clothing to such an extent as to render it dangerous to the child's life, and being so conscious, instead of preventing her from continuing in this course, he allowed her to do so, and was culpably negligent of the obvious duty cast upon him, then he is guilty of the offence charged, because then, substantially, he would have neglected to provide the child with proper food and clothing.

*The jury acquitted the prisoner.*

*Huddleston and Powell*, for the prosecution.

*Pigott* was assigned by the court, at the trial, as counsel for Bubb. Hook was undefended.

# APPENDIX.

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## PRECEDENTS.

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### No. I.

*Indictment for keeping a Lunatic Asylum without a Licence, under 8 & 9  
Vict. c. 100.*

CENTRAL Criminal Court, } The jurors for our Sovereign Lady  
to wit. } the Queen upon their oath present, that  
P. F., late of the parish of Heston, in the county of Middlesex, labourer,  
heretofore and after the passing of a certain Act of Parliament, made and  
passed in the ninth year of the reign of our Sovereign Lady the now  
Queen, intituled "An Act for the Regulation of the Care and Treatment  
of Lunatics," to wit, on the 28th day of June, in the year of our Lord  
1849, to wit, in the parish aforesaid, in the county of Middlesex, and  
within the jurisdiction of the said court, did unlawfully, knowingly, wil-  
fully and corruptly, and against the form of the statute in such case made  
and provided, receive at one and the same time, into a certain house  
situate in the parish aforesaid, in the county aforesaid, and within the  
jurisdiction of the said court, two persons of unsound mind, to wit,  
E. W. and M. G., each of such last-mentioned persons then and there  
being of unsound mind, the said house then and there not being an  
asylum or an hospital duly registered under the said act of Parliament,  
or a house for the time being duly licensed under the said act or any of  
the acts thereby repealed, according to the form of the statute in such  
case made and provided, and against the peace of our said Lady the  
Queen, her crown and dignity, &c.

*Second Count.*—And the jurors aforesaid, upon their oath aforesaid, do Second count.  
further present, that the said P. F., heretofore and after the passing of the  
said first-mentioned act of Parliament, to wit, on the 28th day of June,  
in the year of our Lord 1849, to wit, in the parish aforesaid, in the  
county of Middlesex aforesaid, and within the jurisdiction of the said  
court, did unlawfully, knowingly, wilfully and corruptly, and against the  
form of the statute in such case made and provided, receive at one and  
the same time into a certain house situate within the jurisdiction of the  
said court, two persons, to wit, E. W. and M. G., each of such last-men-  
tioned persons then and there being of unsound mind, the said last-

*Precedents.*  
 No. I.  
 Indictment for  
 keeping a  
 lunatic asylum  
 without a  
 licence.

mentioned house then and there not being a house duly licensed under the said first-mentioned act of Parliament, or any of the acts thereby repealed, for the reception of lunatics, and not being a lunatic asylum which, at the time of the passing of the said first-mentioned act of Parliament, had been erected or established under an act passed in the forty-eighth year of the reign of his late Majesty King George the Third, intituled "An Act for the better Care and Maintenance of Lunatics, being Paupers or Criminals in England," or which had been erected or established under, or which had been made subject or liable to any of the provisions of an act passed in the ninth year of the reign of his late Majesty King George the Fourth, intituled "An Act to amend the Laws for the Erection and Regulation of County Lunatic Asylums, and more effectually to provide for the Care and Maintenance of Pauper and Criminal Lunatics in England," or which had been erected or established under the provisions of any act for the erection or regulation of county or borough lunatic asylums, and not being any hospital, or part of an hospital, or other house or institution (not being an asylum) wherein certain lunatics were received and supported wholly or partly by voluntary contributions, or by any charitable bequest or gift, or by applying the excess of payments of some patients for or towards the support, provision or benefit of other patients, registered under the said first-mentioned act of Parliament, contrary to the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Third count.

*Third Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said P. F., heretofore and after the passing of a certain act of Parliament, made and passed in the ninth year of the reign of our Sovereign Lady the now Queen, intituled "An Act for the Regulation of the Care and Treatment of Lunatics," to wit, on the 28th day of June, in the year of our Lord 1849, to wit, in the parish aforesaid, in the county of Middlesex aforesaid, and within the jurisdiction of the said court, did unlawfully, knowingly, wilfully and corruptly, and against the form of the statute in such case made and provided, receive two lunatics, to wit, one E. W. and one M. G., each of the said last-mentioned persons then and there being a lunatic, into a certain house situate in the county of Middlesex, and within the jurisdiction of the said court, the same house then and there not being an asylum within the meaning of the said act of Parliament, so made and passed in the ninth year of the reign of our said Lady the Queen, intituled "An Act for the Regulation of the Care and Treatment of Lunatics," or an hospital registered under the said last-mentioned act, or a house duly licensed under the said last-mentioned act, or one of the acts thereby repealed, contrary to the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

## No. II.

*Indictment for obtaining Money by falsely pretending that the Defendant was the Secretary to a Society called "The Animals Friend Society," and duly authorized to collect Subscriptions on its behalf.*

CENTRAL Criminal Court, } The jurors for our Lady the Queen  
to wit. } upon their oath present, that J. P. H.,  
late of the parish of Saint Marylebone, in the county of Middlesex, and  
within the jurisdiction of the Central Criminal Court, labourer, H. R.,  
late of the same place, labourer, and T. B., late of the same place,  
labourer, being evil disposed persons, and wickedly and fraudulently  
devising and intending to deceive, cheat and defraud one W. J. on the  
18th day of April, in the year of our Lord 1849, at the parish aforesaid,  
in the county aforesaid, and within the jurisdiction of the said Central  
Criminal Court, did apply to the said W. J. for a certain sum of money  
as a subscription for and in aid of a society then alleged to have been  
established for the purpose of protecting animals from cruelty, under the  
name of the "Animals Friend Society;" and the said J. P. H., H. R.  
and T. B., did then and there unlawfully, knowingly and designedly  
falsely pretend to the said W. J. that the said society then existed under  
the patronage of divers noblemen, gentlemen, clergymen and distin-  
guished respectable persons; that such society was then under the  
management of a committee of gentlemen, that he the said J. P. H.  
then was the secretary of such society, and was then authorized to  
receive contributions of money for and in aid of the said society. By  
means of which said false pretences they the said J. P. H., H. R. and  
T. B. did then and there unlawfully, knowingly and designedly fraudu-  
lently obtain of and from the said W. J. one piece of the current gold  
coin of this realm called a half-sovereign, one piece of the current  
silver coin of this realm called a crown, one piece of the current silver  
coin of this realm called a half-crown, two pieces of the current silver  
coin of this realm called shillings, one piece of the current silver coin of  
this realm called a sixpence, and divers, to wit, ten other pieces of the  
current coin of this realm, amounting in value to a large sum, to wit,  
the sum of ten shillings, the denomination of which said last-mentioned  
pieces of coin respectively is to the jurors aforesaid unknown, of the  
moneys of the said W. J., with intent then and there to cheat and  
defraud the said W. J. of the said several moneys and pieces of coin  
respectively, whereas in truth and in fact the said pretended society  
then had no existence whatsoever, but was pretended to exist in manner  
aforesaid by the said J. P. H., H. R. and T. B. for the purposes of fraud  
and deceit, and for no other purpose whatsoever. All and every of  
which said false pretences in this count mentioned they the said J. P. H.,  
H. R. and T. B. at the time they so pretended as aforesaid well knew to  
be false, to the great injury and deception of the said W. J., to the  
evil and pernicious example of all other persons in the like case offending,  
against the form of the statute in such case made and provided, and  
against the peace of our said Lady the Queen, her crown and dignity.

*Second Count.*—And the jurors aforesaid, upon their oath aforesaid, do Second count.  
further present, that the said J. P. H., H. R. and T. B., being such  
evil disposed persons as aforesaid, and devising and intending to deceive,

*Precedents.*

No. II.  
Indictment for  
obtaining  
money by false  
pretences.

cheat and defraud one W. B. on the said 18th day of April, in the year of our Lord 1849, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, did make application to Emma, wife of the said W. B., for a certain sum of money as a contribution for and in aid of a society then alleged to have been established for the purpose of protecting animals from cruelty, under the name of the "Animals Friend Society;" and the said J. P. H., H. R. and T. B., did then and there unlawfully, knowingly and designedly falsely pretend to the said E. B. that the said society then existed under the patronage of divers noblemen, gentlemen, clergymen and distinguished and respectable persons, and that such society then was under the management of a committee of gentlemen, and that he the said H. R. was then authorized to receive contributions of money for and in aid of the said society. By means of which said false pretences in this count mentioned, they the said J. P. H., H. R. and T. B., did then and there unlawfully, knowingly and designedly fraudulently obtain of and from the said E. B. one piece of the current silver coin of this realm called a crown, one piece of the current silver coin of this realm called a half-crown, two pieces of the current silver coin of this realm called shillings, two pieces of the current silver coin of this realm called sixpences, and divers, to wit, five other pieces of the current coin of this realm, amounting in value to a large sum, to wit, the sum of five shillings, of the moneys of the said W. B., with intent to cheat and defraud the said W. B. of the said several moneys and pieces of coin in this count mentioned; whereas in truth and in fact the said pretended society in this count mentioned then had no existence whatsoever, but was by the said J. P. H., H. R. and T. B., pretended to exist in manner aforesaid, for the purposes of fraud and deceit, and for no other purpose whatsoever, all and every of which said false pretences in this count mentioned they the said J. P. H., H. R. and T. B., at the time they so falsely pretended as in this count aforesaid, well knew to be false, to the great injury and deception of the said W. B., to the evil and pernicious example of all other persons in the like case offending, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Third count.

*Third Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. P. H., H. R. and T. B., and divers evil disposed persons, whose names to the jurors aforesaid are as yet unknown, afterwards, to wit, on the 1st day of January, A.D. 1849, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully and wickedly did conspire, combine, confederate and agree together unlawfully and falsely to pretend, give out, represent and cause it falsely to appear that a certain society for the protection of animals from cruelty then existed under the patronage of divers distinguished and respectable persons, and by divers false pretences, misrepresentations, and artful, subtle and fraudulent means and devices, to induce and persuade divers of Her Majesty's humane and benevolent liege subjects, to deposit in the hands of them the said J. P. H., H. R. and T. B., divers of the moneys of the said liege subjects, as contributions in aid of and for the support of such pretended society, and unlawfully, unjustly, deceitfully, fraudulently and in violation of the trust upon which such moneys should be deposited, to convert the said moneys to the use, ends and purposes of the said J. P. H., H. R. and T. B., and so to cheat and defraud the said liege subjects of our

Lady the Queen of their said moneys, in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all other persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

*Precedents.*  
No. II.  
Indictment for  
obtaining  
money by false  
pretences.

## No. III.

*Indictment under the 5 & 6 Vict. c. 51, s. 2, for shooting at the Queen with intent to injure her.*

CENTRAL Criminal Court, } The jurors of our Lady the Queen First count.  
to wit. } upon their oath present, that William Hamilton, late of the parish of St. Martin-in-the-Fields, in the city of Westminster, labourer, on the 19th day of May, in the year of our Lord 1849, at the parish aforesaid, in the said city of Westminster, and within the jurisdiction of the said court, a certain pistol then and there containing a certain explosive material, to wit, gunpowder, which he the said W. H. in his right hand then and there had and held, unlawfully, wilfully, knowingly and maliciously did discharge at the person of our Lady the Queen, with intent thereby then and there to injure the person of our said Lady the Queen, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Second Count.*—And the jurors aforesaid, upon their oath aforesaid, Second count.  
do further present, that the said W. H., on the day and year aforesaid, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, a certain pistol then and therein containing a certain explosive material, to wit, gunpowder, which said last-mentioned pistol he the said W. H. in his right hand then and there had and held, unlawfully, wilfully, knowingly and maliciously did discharge near to the person of our said Lady the Queen, with intent thereby then and there to injure the person of our said Lady the Queen, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Third Count.*—And the jurors aforesaid, upon their oath aforesaid, Third count.  
do further present, that the said W. H., on the day and year aforesaid, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, a certain pistol then and there containing a certain explosive material, to wit, gunpowder, which said last-mentioned pistol he the said W. H. in his right hand then and there had and held, unlawfully, wilfully, knowingly and maliciously did discharge at the person of our said Lady the Queen, with intent thereby then and there to break the public peace, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Fourth Count.*—And the jurors aforesaid, upon their oath aforesaid, Fourth count.  
do further present, that the said W. H., on the day and year aforesaid, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, a certain pistol then and there containing a certain explosive material, to wit, gunpowder, which said last-mentioned pistol



*Precedents.*

No. III.  
Indictment  
under the 5 & 6  
Vict. c. 51, s. 2,  
for shooting at  
the Queen with  
intent to injure  
her.

he the said W. H. in his right hand then and there had and held, unlawfully, wilfully, knowingly and maliciously did discharge near to the person of our said Lady the Queen, with intent thereby then and there to break the public peace, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Fifth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. H., on the day and year aforesaid, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, a certain pistol then and there containing a certain explosive material, to wit, gunpowder, which said last-mentioned pistol he the said W. H. in his right hand then and there had and held, unlawfully, wilfully, knowingly and maliciously did discharge at the person of our Lady the Queen, with intent thereby then and there to alarm our said Lady the Queen, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

*Sixth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. H., on the day and year aforesaid, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said court, a certain pistol then and there containing a certain explosive material, to wit, gunpowder, which said last-mentioned pistol he the said W. H. in his right hand then and there had and held, unlawfully, wilfully, knowingly and maliciously did discharge near to the person of our Lady the Queen, with intent thereby then and there to alarm our said Lady the Queen, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

## No. IV.

*Indictment for Perjury committed before Commissioners of Bankruptcy with Counts, under 5 & 6 Vict. c. 122, s. 81. (a)*

CENTRAL Criminal Court, } The jurors for our Sovereign Lady  
to wit. } the Queen upon their oath present,  
that heretofore and after the passing and commencement of a certain act of Parliament, made and passed in a session of Parliament holden in the fifth and sixth years of the reign of our said Lady the Queen, intituled "An Act for the Amendment of the Laws of Bankruptcy," and before the committing the offence hereinafter mentioned, to wit, on the 28th day of April, in the year of our Lord 1849, one Hugh Swan, of the parish of Saint Pancras, in the county of Middlesex, draper, being a trader within the true intent and meaning of the laws and statutes then and still in force relating to bankrupts, and being indebted to John Falshaw Pawson and John Stone (the said J. F. P. and J. S. then and there being partners in trade), of the city of London, in a certain sum of money exceeding 50*l.*, to wit, in the sum of 300*l.* for the price and value of divers goods before then sold and delivered by the said J. F. P. and J. S., then being such partners as aforesaid, to the

(a) This section is repealed by the 12 & 13 Vict. c. 106, but re-enacted.

said H. S., and the said H. S. so being such trader as aforesaid, and so being indebted as aforesaid, did, at the parish aforesaid, in the county aforesaid, on the day aforesaid, in the year aforesaid, commit an act of bankruptcy, that is to say, by filing in the office of the Lord Chancellor's Secretary of Bankrupts a declaration in writing, signed by him the said H. S. as such trader as aforesaid, and attested by an attorney, that he the said H. S. was unable to meet his engagements, and which said declaration is as follows :—

*Precedents.*  
No. IV.  
Indictment for perjury committed before Commissioners of Bankruptcy with counts, under the 5 & 6 Vict. c. 122, s. 81.

I the undersigned H. S., of No. 59, High-street, Camden Town, and of No. 15, Hanway-street, Tottenham Court-road, both in the county of Middlesex, draper, do hereby declare that I am unable to meet my engagements.

Dated this 27th day of April, in the year of our Lord 1849.

HUGH SWAN.

*Witness,* ALBERT READ,  
Attorney of the Court of Queen's Bench,  
15, Tollington Park, Hornsey Road.

And that afterwards and within two calendar months from the said 28th April, 1849, to wit, on the 28th day of April, 1849, a fiat in bankruptcy against the said H. S. directed to Her Majesty's Court of Bankruptcy was duly issued and was duly sent and transmitted to the said court and there filed of record, and the said H. S. was thereupon afterwards, to wit, on the 28th day of April, in the year aforesaid, duly adjudged and declared a bankrupt, and that after the said declaration and adjudication of the said H. S. as a bankrupt, to wit, on the 15th day of June, 1849, in the said Court of Bankruptcy, to wit, at the parish of Saint Michael Bassishaw, in the city of London, and within the jurisdiction of the said Central Criminal Court, Charles Bishop, late of the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said Central Criminal Court, labourer, being duly summoned as a witness in the said fiat to give evidence touching the person, trade, dealings, and estate of the said H. S., did personally appear before Robert George Cecil Fane, Esq., one of the commissioners of the said Court of Bankruptcy, authorized to act in the prosecution of the said fiat against the said H. S., and was duly sworn and took his corporal oath upon the Holy Gospel of God, before the said R. G. C. F., Esq., so being such commissioner as aforesaid, that he the said C. B. should true answer make to all such questions as should be put to him by virtue of the said fiat so awarded against the said H. S. (he the said R. G. C. F., Esq., such commissioner as aforesaid having then and there competent authority to administer the said oath to him the said C. B. in that behalf), and was thereupon then and there duly examined and questioned before the said R. G. C. F., Esq., such commissioner as aforesaid, by word of mouth, concerning the trade, dealings, and estate of the said H. S. as such bankrupt as aforesaid, and upon the said examination and in the course of the same the following questions became and were and each of them respectively became and was material, that is to say, whether the lease of a certain farm called Park Farm, situate in the parish of Mortlake, in the county of Surrey, then was the property of the said H. S., or had been his property before his bankruptcy, and whether the farming utensils and stock and cattle and

*Precedents.*

No. IV.  
Indictment for  
perjury com-  
mitted before  
Commissioners  
of Bankruptcy  
with counts,  
under the  
5 & 6 Vict.  
c. 122, s. 81.

the produce of the same stock and cattle upon the said farm, or any of the said utensils, or any part of the said stock and cattle, or any part of the said produce of the said stock and cattle, were or was the property of the said H. S., or had been his property before his bankruptcy as aforesaid, and whether the said farm and farming utensils and stock and cattle upon the said farm had been bought and purchased by the said C. B. with the money of the said H. S., and in trust for the said H. S., or with money borrowed from the said H. S., and whether he the said C. B. had borrowed any money of the said H. S. to assist in the purchase of the said farm, and whether all the money which he the said C. B. had paid for the said farm was his own, and whether the lease of the said farm and all the property thereon were his the said C. B.'s own property, and whether any one else had any claim to the said lease or to the said property, and whether he the said C. B. had had any horses, cows, sheep, or any other animals of any kind belonging or that had belonged to the said H. S. upon the said farm, and whether the valuation of the stock of the said farm, when the same was alleged to be bought by the said C. B., amounted to the sum of 299*l.* 5*s.* only, and whether the same did not amount to the sum of 351*l.* 5*s.*, and whether or not the sum paid by the said C. B. for the said stock of the said farm was not the sum of 349*l.* 5*s.*, and whether the money so paid by the said C. B. was his own, and whether the said C. B. had ever put any money in the Bank of England, and whether the said C. B. had ever deposited any sum of money in the Bank of England, and whether the said C. B. had received 100*l.* as a prize in a horse-race in 1846, and kept 95*l.* thereof in a box in his house from the time he received the same in the said year, 1846, till the year 1848, and whether he had ever lent any part of the said sum of 95*l.*, and whether he had deposited any portion of that sum of money in the Bank of England, and whether he had ever told any one that the said farm was not his the said C. B.'s own property, and whether he the said C. B. had ever told any one that the said farm was the property of the said H. S., and whether the said C. B. had ever told any one that the farming utensils and the stock upon the said farm were the property of the said H. S., and whether he the said C. B. had told any one that any of the property on the said farm was the property of the said H. S., and whether he the said C. B. had ever told any one that he the said C. B. was managing the said farm for the said H. S., and whether the said C. B. had ever told any one that he the said C. B. was to receive 20*l.* or any other sum for taking care of the said farm, and whether the said C. B. had ever told any one that the said H. S. was his the said C. B.'s master, and whether the said C. B. had ever told any one that he was going to take the said farm for the said H. S. That the said C. B. being so sworn, examined, and questioned, as aforesaid, not having the fear of God before his eyes, nor regarding the laws of this realm, but being moved and seduced by the instigation of the devil, and contriving and intending to pervert the due course of law and justice, and to defraud the creditors of the said H. S., and to obtain for himself the said C. B. divers great gains and profits then and there upon the said examination, upon his oath aforesaid, in answer to divers questions which were then and there put to him by virtue of the said fiat so awarded as aforesaid against the said H. S., falsely, knowingly, maliciously, wilfully, and corruptly before the said R. G. C. F., Esq., such commissioner as aforesaid, and having such lawful and competent authority

aforesaid to administer the oath in that behalf, did depose and swear  
 amongst other things in substance and to the effect following, that is to  
 say, That the lease of the said Park Farm (meaning the said Park Farm  
 in the parish of Mortlake, in the county of Surrey), and all the property  
 meaning the farming utensils and stock and cattle thereon), were his  
 meaning the said C. B.'s own property, and that no one except himself  
 had any claim to the said lease of the said farm and the said property on  
 the said farm; that he had had no horses or cows nor any animals of any  
 kind belonging or that had belonged to Mr. Hugh Swan (meaning the  
 said H. S.), on his the said C. B.'s premises (meaning the said farm);  
 that all the money he the said C. B. paid for the same was his own, that  
 the valuation of the stock of the said farm amounted to the sum of  
 299*l.* 5*s.* only, and that he had paid the said sum of 299*l.* 5*s.* only for the  
 said stock, that all the said sum of 299*l.* 5*s.* was accumulated in six years  
 by the earnings of himself and his wife, with the exception of 95*l.* which  
 he received in 1846 as a prize in a Derby sweep; that he kept the said  
 sum of 95*l.* by him in a box from the time he received the same in the  
 year of our Lord 1846 till he had to pay the said sum of 299*l.* 5*s.* in the  
 year of our Lord 1848; that he never lent any of that money (meaning  
 the said sum of 95*l.*); that he never put money in the Bank of Eng-  
 land; that he never told any one that the said Park Farm was the said  
 H. S.'s property; that he the said C. B. never told any one that he the  
 said C. B. was to receive 20*s.* or any other sum of money for taking care  
 of the said Park Farm; that he never told any one that the said H. S.  
 was his master; that he never told any one that all or any of the prop-  
 erty in the said Park Farm was the bankrupt's (meaning the said H.  
 S.) property, and that he never told any one that he was going to take  
 the said farm (meaning the said farm), for the said H. S. (meaning the said  
 H. S.); whereas in truth and in fact the lease of the said farm and all  
 the property thereon were not the property of the said C. B. And  
 whereas in truth and in fact neither the lease of the said farm nor any of  
 the property thereon was the property of the said C. B.; and whereas in  
 truth and in fact another person, namely, the said H. S., had a claim to  
 the said lease of the said farm and the said property on the said farm;  
 and whereas in truth and in fact the said C. B. had had on the said farm  
 divers animals that had belonged to the said H. S., to wit, two horses,  
 six cows, three heifers, sixteen sheep, and a pony; and whereas in truth  
 and in fact all the money which he the said C. B. paid for the said farm  
 was not his own money, nor was any part thereof his own money; and  
 whereas in truth and in fact the valuation of the stock of the said farm  
 did not amount to the sum of 299*l.* 5*s.* only, but amounted to a larger  
 sum, to wit, the sum of 351*l.* 5*s.*; and whereas in truth and in fact he  
 did not pay the said sum of 299*l.* 5*s.* only for the stock, but he paid a  
 larger sum, to wit, the sum of 349*l.* 5*s.*; and whereas in truth and in  
 fact the said sum of 299*l.* 5*s.* was not accumulated in six years or in any  
 number of years by the earnings of himself and his wife, but was the  
 money of the said H. S.; and whereas in truth and in fact he the said  
 C. B. had not kept the said sum of 95*l.* by him in a box from the time  
 he received the same in the year of our Lord 1846 till he had to pay the  
 said sum of 299*l.* 5*s.* in the year of our Lord 1848; and whereas in  
 truth and in fact he the said C. B. had lent some of the said money, to  
 wit, the sum of 20*l.*, to wit, on the 10th day of July, in the year of our  
 Lord 1846, at the parish aforesaid, in the county aforesaid, to wit, to one  
 Benjamin Whur, and divers other sums to divers other persons to the

*Precedents.*

No. IV.

Indictment for  
perjury com-  
mitted before  
Commissioners  
of Bankruptcy,  
with counts  
under the  
5 & 6 Vict.  
c. 122, s. 81.

*Precedents.*

No. IV.  
Indictment for  
perjury com-  
mitted before  
Commissioners  
of Bankruptcy,  
with counts  
under the  
5 & 6 Vict.  
c. 122, s. 81.

jurors unknown on the day and year aforesaid, at the parish aforesaid, in the county aforesaid; and whereas in truth and in fact he the said C. B. had put money, to wit, the sum of 25*l*., in the Bank of England, to wit, on the 10th day of July, in the year last aforesaid, at the parish aforesaid, and in the county aforesaid; and whereas in truth and in fact he had told divers persons, to wit, one John Hopking, one George Colton Moore, and one Catherine Moore, and divers other lieges, that the said Park Farm was the said H. S.'s property; and whereas in truth and in fact the said C. B. had told divers other persons, to wit, one J. H., one G. C. M., and one C. M., and divers other lieges, that he was to receive 20*s*. for taking care of the said farm; and whereas in truth and in fact he had told divers other persons that the said H. S. was his master; and whereas in truth and in fact he the said C. B. had told one person, to wit, J. H., and divers other persons, that all the property in the said farm was the property of the bankrupt (meaning the said H. S.); and whereas in truth and in fact he had told G. C. M. that he the said C. B. was going to take the said Park Farm for the said H. S., the said C. B. well knowing the truth of all the said premises when he swore to the contrary thereof as aforesaid, and so the jurors aforesaid, upon their oath aforesaid, do say that the said C. B., on the said 15th day of June, in the said year of our Lord 1849, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the said Central Criminal Court, in manner and form aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, falsely, wickedly, knowingly, wilfully, and corruptly, did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our Lady the Queen and her laws, to the evil example of all others in the like case offending, against the form of the statute in that case made and provided, and against the peace, &c.

*Second count.*

*Second Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that before the committing of the offence in this count hereinafter mentioned, to wit, on the 28th day of April, 1849, the said H. S., of the parish of St. Pancras, in the county of Middlesex, draper, being a trader within the meaning of the Bankrupt Laws as aforesaid, and being indebted to J. F. P. and J. S., then and there being partners in trade of the city of London, in a certain sum of money exceeding 50*l*., to wit, in the sum of 300*l*., did, on the day aforesaid, in the year aforesaid, commit an act of bankruptcy, that is to say, by filing in the office of the Lord Chancellor's Secretary of Bankrupts a declaration in writing, signed by him the said H. S., as such trader as aforesaid, and attested by an attorney, that he the said H. S. was unable to meet his engagements, and that afterwards, and within two calendar months from the said 28th day of April, 1849, to wit, on the 28th day of April in the said year, a fiat in bankruptcy, directed to the Court of Bankruptcy, was duly issued against him the said H. S., and was transmitted to the said court and there filed of record, and that he was thereupon afterwards, to wit, on the 28th day of April, 1849, in the said Court of Bankruptcy, to wit, at the parish of Saint Michael Bassishaw, in the city of London, and within the jurisdiction of the Central Criminal Court, duly declared and adjudged a bankrupt, and that after the said declaration and adjudication of him as a bankrupt as aforesaid, a meeting was holden, to wit, on the 15th day of June, in the year aforesaid, to wit, at the parish of Saint Michael Bassishaw last aforesaid, in the city of London aforesaid, and within the jurisdiction aforesaid, in the said Court of Bankruptcy.

before R. G. C. F., Esq., one of the commissioners of the said court duly authorized to act in the prosecution of the said fiat against the said H. S., to inquire touching the dealings, estate, and effects of the said H. S. as such trader and bankrupt as aforesaid, and that at the said meeting, to wit, on the day and year last aforesaid, at the parish aforesaid, in the city aforesaid, and within the jurisdiction aforesaid, the said C. B. *was present*, and was duly sworn and took his corporal oath upon the Holy Gospel of God, before the said R. G. C. F., Esq., so acting and presiding as a commissioner as aforesaid in the prosecution of the said fiat, that he the said C. B. should true answer make to all such questions as should be put to him by virtue of the said fiat so awarded against the said H. S., he the said R. G. C. F., Esq., such commissioner aforesaid, having then and there competent authority to administer the said oath to him the said C. B., and was thereupon then and there duly examined upon oath before the said R. G. C. F., Esq., such commissioner as aforesaid, touching the trade, dealings and estate of the said H. S. as such trader and bankrupt as aforesaid, and upon the said examination, and in the course of the same it became and was material, &c.: (conclusion same as 1st count.)

The 3rd and 4th counts were similar to the 1st and 2nd respectively, except that instead of alleging that the defendant had committed wilful and corrupt perjury, it alleged that he did falsely, wickedly, knowingly, wilfully, and corruptly give false evidence (under the 5 & 6 Vict. c. 122, s. 81.)

*Precedents.*

No. IV.  
Indictment for perjury committed before Commissioners of Bankruptcy, with counts under the 5 & 6 Vict. c. 122, s. 81.

## CRIMINAL APPEAL COURT.

*" Court for Crown Cases Reserved.—Exchequer Chamber,  
" Westminster.—Trinity Term, 13th Victoria.*

" **W**HEREAS by an act made and passed in the 11th and 12th years of the reign of Her present Majesty, entitled, 'An Act for the further Amendment of the Administration of the Criminal Law,' it is amongst other things enacted, that when any person shall have been convicted of any treasonable felony, or misdemeanor, before any Court of Oyer and Terminer, or Gaol Delivery, or Court of Quarter Sessions, the judge, or commissioner, or justices of the peace, before whom the case shall have been tried, may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and Barons of the Exchequer.

" That the judge, or commissioner, or Court of Quarter Sessions, shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen, and such case shall be transmitted to the said justices and barons.

" And whereas it is expedient that regulations be made for the convenience of the court established under the said recited act.

*Criminal  
Appeal Court.*  
General Order.

"It is ordered, that when any case shall be transmitted by a Court of Oyer and Terminer, or Gaol Delivery, or Court of Quarter Sessions, for the consideration of this court, the original case signed by the judge, or commissioner, or chairman of sessions, reserving the question of law, and seventeen copies of such case, one for each judge, and one for each party, shall be delivered to the clerk of this court, at the Exchequer Chamber, Westminster, at least four days before the day appointed for the sitting of the said court.

"That every case transmitted for the consideration of this court briefly state the question or questions of law reserved, and such facts only as raise the question or questions submitted; if the question turn upon the indictment, or upon any count thereof, then the case must set forth the indictment or the particular count.

"That no case be heard upon any demurrer to the pleadings.

"That every case state whether judgment on the conviction was passed, or postponed, or the execution of the judgment respited, and whether the person convicted be in prison, or has been discharged on recognizance on bail to appear and receive judgment, or to render himself in execution.

"That when any case is intended to be argued by counsel, or by the parties, notice thereof be given to the clerk of this court, at least two days previously to the sitting of the said court.

"That with every case delivered to the judges of this court (except such cases as shall be reserved by such judges) the fee payable to the clerks of the said judges shall not exceed the fee payable on 'demurrer and other paper books,' as contained in the table of fees allowed and sanctioned by the judges, pursuant to the statute 1st Vict. c. 30.

"CAMPBELL,  
"T. WILDE,  
"F. POLLOCK,  
"J. PARKE,  
"E. H. ALDERSON,  
"J. PATTESON,  
"J. T. COLERIDGE,

"R. M. ROLFE,  
"W. WIGHTMAN,  
"C. CRESSWELL,  
"W. ERLE,  
"T. J. PLATT,  
"E. V. WILLIAMS,  
"T. N. TALFOURD.

"Read in open court, the 1st of June, 1850.

"RICHARD MORRIS."

## No. V.

*Indictment for Conspiracy to obtain Money by Falsely Pretending that the Defendants were in a large way of Business, requiring Clerks and Servants to conduct it, and then demanding from those who offered themselves Money to be deposited as Security for their Good Behaviour.*

CENTRAL Criminal Court, } The jurors for our Lady the Queen  
to wit. } upon their oath present, that J. C. late  
of the parish of St. George, Bloomsbury, in the county of Middlesex, and  
within the jurisdiction of the Central Criminal Court, labourer; C. S.  
late of the same place, labourer; and E. W. the younger, late of the same  
place, labourer, being evil disposed persons, and seeking to get their  
living by divers unlawful, dishonest and fraudulent means and devices,  
on the 6th day of February, in the year of our Lord 1850, at the parish  
aforesaid, and within the jurisdiction of the said court, did, amongst  
themselves, and together with divers other persons, whose names to the  
jurors aforesaid are unknown, unlawfully, wickedly, and deceitfully con-  
spire, combine, confederate, and agree together, by divers artful and  
subtle stratagems, ways, means, and devices, and false representations,  
to represent and cause themselves to be believed to be persons carrying  
on large and extensive business, and requiring the assistance of clerks  
and servants, and by requiring money to be deposited with them as  
security for the honesty and good conduct of such persons as should offer  
themselves to become such clerks and servants, to obtain from such  
persons divers of their moneys and property of great value, and to cheat  
and defraud them respectively of the same money and property. And the  
jurors aforesaid, upon their oath aforesaid, further present that the said  
C. S. and E. W. in pursuance and performance of the said conspiracy,  
combination, confederacy and agreement, afterwards, to wit, on the 7th day  
of February, in the year aforesaid, at the parish aforesaid, and within the  
jurisdiction of the said court, unlawfully and fraudulently did obtain of  
and from one J. H. divers of his moneys of great value, to wit, of the  
value of 20*l.*, and did then and there cheat and defraud the said J. H. of  
his said moneys; and the jurors aforesaid, upon their oath aforesaid,  
further present that the said C. S. and E. W. in further pursuance and  
performance of the said conspiracy, combination, confederacy and agree-  
ment, to wit, on the 19th day of February, in the year aforesaid, at the  
parish aforesaid, and within the jurisdiction of the said court, unlawfully  
and fraudulently did obtain of and from one A. S. divers of his moneys  
of great value, to wit, of the value of 5*l.*, and did then and there cheat  
and defraud the said A. S. of the same moneys, in contempt of our said  
Lady the Queen and her laws, to the great damage and injury of the said  
J. H. and A. S., and against the peace of our Lady the Queen, her crown  
and dignity.



## No. VI.

*Indictment for Selling a Diseased Cow in a Public Market.*

LONDON, } The jurors for our Lady the Queen upon their oath to wit. } present, that J. L. P. late of London, labourer, on the 1st day of April, in the 13th year of the reign of our Sovereign Lady Victoria, the now Queen, at London (that is to say), at the parish of St. Sepulchre, in the ward of Farringdon Without, in London aforesaid, was possessed of a certain cow, which said cow was then and there infected with a contagious, infectious and dangerous disease; and that the said J. L. P. well knowing the premises, afterwards, and whilst the said cow of the said J. L. P. was so infected as aforesaid, on the day and year aforesaid, with force and arms at the parish and in the ward aforesaid, in London aforesaid, unlawfully, wickedly, wilfully, maliciously, and injuriously, did drive and bring, and cause and procure to be driven and brought, the said cow so infected as aforesaid, through and along divers public streets and ways where certain other cattle of the liege subjects of our said Lady the Queen were then passing unto and into a certain market, called Smithfield Market, situate and being in the city of London aforesaid, during the period that the liege subjects of our said Lady the Queen were then and there holding the said market, which was then and there public and open to all the liege subjects of our said Lady the Queen, for the purpose of buying and selling their cattle therein, and that he the said J. L. P. well knowing the premises as aforesaid, kept and continued the said cow so infected as aforesaid, in the said market during the period of the holding the same as aforesaid, for a long space of time, to wit, for the space of twelve hours then next following; and in which said market, during the whole of the said last-mentioned period, there were, and of right ought to have been, divers other cows and cattle of certain liege subjects of our said Lady the Queen then and there passing and being. By means of which said several premises, the said last-mentioned cows and cattle so passing and being along and in the said market, became and were liable to be infected by the contagious infection and dangerous disease with which the said cow of the said J. L. P. was infected as aforesaid, to the damage, &c.; to the evil example, &c., and against the peace of our Lady the Queen, her crown and dignity.

Second count.

*Second Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, on the day and year aforesaid, at the parish and in the ward aforesaid, in London aforesaid, there was, and from time immemorial hath been, and still is, a certain public market, called Smithfield Market, where butchers and other liege subjects of our said Lady the Queen assemble and meet together for the purpose of buying cattle, to be subsequently slaughtered by them for the food of certain others of the liege subjects of our said Lady the Queen; and that afterwards, to wit, on the day and year aforesaid, at the parish and in the ward aforesaid, in London aforesaid, the said J. L. P. was possessed of one other cow, then and there infected with a contagious, infectious and dangerous disease; and that the said J. L. P. well knowing the said last-mentioned premises, afterwards, and whilst the said last-mentioned cow,

of the said J. L. P. was so infected as aforesaid, on the day and year aforesaid, with force and arms, at the parish and in the ward aforesaid, in London aforesaid, unlawfully, wickedly, wilfully, maliciously, and injuriously, did drive and bring, and cause and procure to be driven and brought, the said last-mentioned cow, so infected as aforesaid, unto and into the said last-mentioned market, with the intention of selling and disposing of the same to the said butchers and others; and that the same might be bought and subsequently slaughtered for the food of certain liege subjects of our said Lady the Queen; and that he the said J. L. P. did then and there unlawfully, wickedly, wilfully, maliciously, and injuriously, and for his own lucre and gain expose to sale, and cause and procure to be exposed to sale, the said last-mentioned cow so infected as aforesaid, in the said public market, with the intention and for the purpose aforesaid, the said J. L. P. then and there well knowing that the said cow, so brought into the said public market and exposed to sale as aforesaid, would, if slaughtered, be unfit and unwholesome for food, and greatly prejudicial to the health of the liege subjects of our said Lady the Queen eating and consuming the same, to the damage, &c.; to the evil example, &c., and against the peace of our said Lady the Queen, her crown and dignity.

*Precedents.*

No. VI.  
Indictment for  
selling a  
diseased cow.

*Third Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, on the day and year aforesaid, at the parish and in the ward aforesaid, in London aforesaid, there was, and from time immemorial hath been, and still is, a certain public and open market, called Smithfield Market, where butchers and other liege subjects of our said Lady the Queen have been used and accustomed to assemble and meet together, and where divers and very many butchers and other liege subjects of our said Lady the Queen were then assembled and met together for the purpose of buying cattle, to be subsequently slaughtered by them for human food, to wit, for the food of certain others of the liege subjects of our said Lady the Queen; and that afterwards, to wit, on the day and year aforesaid, in the said public and open market, at the parish and in the ward aforesaid, in London aforesaid, the said J. L. P. was possessed of one other cow, which was then and there infected with a loathsome, deadly and dangerous disease, and which said last-mentioned cow, he the said J. L. P. then and there well knew would, if slaughtered, be unfit and unwholesome for human food, and greatly prejudicial to the health of any of the liege subjects of our said Lady the Queen who might eat and consume the same; and he the said J. L. P. well knowing the said last-mentioned premises, afterwards, and whilst the said last-mentioned cow of the said J. L. P. was so infected with the said disease as aforesaid, on the day and year aforesaid, with force and arms, at the parish and in the ward aforesaid, in London aforesaid, unlawfully, wickedly, wilfully, maliciously, and injuriously, and for his own lucre and gain, did expose to sale, and cause and procure to be exposed to sale, in the said public and open market, the said last-mentioned cow which was so then and there infected with the said disease as aforesaid, with the intention of selling and disposing of the same to the said butchers and others so then and there assembled and met together as aforesaid, and that the same might be bought and subsequently slaughtered for human food, to wit, for the food of certain liege subjects of our said Lady the Queen, he the said J. L. P. then and there well knowing that the said last-mentioned cow, so then and there exposed to sale as aforesaid, would, if slaughtered, be unfit and unwholesome for human food, and greatly prejudicial to the health of the liege subjects of

*Third count.*

*Precedents.*

No. VI.  
Indictment for  
selling a  
diseased cow.  
Fourth count.

our said Lady the Queen who might eat and consume the same, to the damage, &c. ; to the evil example, &c., and against the peace of our said Lady the Queen, her crown and dignity.

*Fourth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, on the day and year aforesaid, at the parish and in the ward aforesaid, in London aforesaid, there was, and from time immemorial hath been, and still is, a certain public and open market, called Smithfield Market, where butchers and other liege subjects of our said Lady the Queen have been used and accustomed to assemble and meet together, and where divers and very many butchers and other liege subjects of our said Lady the Queen were then assembled and met together for the purpose of buying cattle, to be subsequently slaughtered by them for human food, to wit, for the food of certain others of the liege subjects of our said Lady the Queen, and that afterwards, to wit, on the day and year aforesaid, in the said public and open market, at the parish and in the ward aforesaid, in London aforesaid, the said J. L. P. was possessed of one other cow, which was then and there infected with a loathsome, deadly and dangerous disease, and which said last-mentioned cow, he the said J. L. P. then and there well knew would, if slaughtered, be unfit and unwholesome for human food, and greatly prejudicial to the health of any of the liege subjects of our said Lady the Queen who might eat and consume the same; and that he the said J. L. P. well knowing the said last-mentioned premises, afterwards, and whilst the said last-mentioned cow of the said J. L. P. was so infected with the said disease as aforesaid, on the day and year aforesaid, with force and arms, at the parish and in the ward aforesaid, in London aforesaid, unlawfully, wickedly, wilfully, maliciously and injuriously, and for his own lucre and gain, did expose to sale in the said public and open market, and did then and there sell the said last-mentioned cow, which was so then and there infected with the said disease as aforesaid, to a certain butcher, to wit, one G. G. in order that the same might be subsequently slaughtered for human food, to wit, for the food of certain liege subjects of our said Lady the Queen, he the said J. L. P. then and there well knowing that the said last-mentioned cow, so then and there sold as aforesaid, would, if slaughtered, be unfit and unwholesome for human food, and greatly prejudicial to the health of the liege subjects of our said Lady the Queen who might eat and consume the same, to the damage, &c. ; to the evil example, &c., and against the peace of our Lady the Queen, her crown and dignity.

## No. VII.

*Indictment for Perjury committed on the Trial of a Cause in the County Court.*

CENTRAL Criminal Court, } The jurors for our Lady the Queen  
to wit. } upon their oath present, that heretofore,  
and before the committing of the offence hereinafter-mentioned, to wit, on  
the 17th day of January, in the year of our Lord 1850, in the Bloomsbury  
County Court of Middlesex, holden at Berner's-street, Oxford-street, in

the said county of Middlesex, and within the jurisdiction of the said Central Criminal Court, a certain action on contract then depending in the said County Court, in which one G. J. then and there was plaintiff, and one D. C. G. (in the said action described and sued as D. D. G.) was defendant, came on to be heard and tried, and then and there in due form of law was heard and tried before Douglas Denon Heath, Esq., then and there being the judge of the said court, in and by which said action the said G. J. sought to recover against the said D. C. G. a certain sum of money then reduced to the sum of twenty pounds, so that the said action should come within the jurisdiction of the said County Court, for professional literary labour and services, alleged to have been performed by the said G. J. at the request of the said D. C. G. as the agent of the said D. C. G. and for money paid as such agents. And the jurors aforesaid, upon their oath aforesaid, do further present that at and upon the said trial there were produced from the custody of the said G. J. to the said D. C. G. a certain writing bearing the signature of one E. L., dated the 25th day of October, in the year of our Lord 1849, and a certain other paper writing containing a list of charges against the said D. C. G., and also a certain letter bearing the signature "C. S.," dated the 22nd day of October, in the year of our Lord 1849, having certain written matter in the form of certificates thereunder written, which said writing, bearing the signature of the said E. L.; and which said letter, bearing the signature "C. S.," were severally addressed to the said D. C. G., and the jurors aforesaid, upon their oath aforesaid, do further present, that at and upon the said hearing and trial, it became and was a material question and subject of inquiry, how and in what manner the said G. J. became possessed of the said writings, and each of them, and whether he had received them from the said D. C. G., and whether they had been voluntarily given up by the said D. C. G. to the said G. J., or whether the said G. J. had dishonestly, or against the consent of the said D. C. G., taken the said writings, or either of them, from and out of the possession of the said D. C. G. And the jurors aforesaid, upon their oath aforesaid, do further present, that at and upon the said hearing and trial of the said action, the said D. C. G. late of the parish of St. George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, gentleman, did tender himself to be examined for and on his own behalf, on the said trial and hearing of the said action, and then and there, before the said Douglas Denon Heath, Esquire, as such judge as aforesaid, was in due manner sworn, and did take his corporal oath upon the Holy Gospel of God, to speak the truth and give true evidence upon such his examination, he the said Douglas Denon Heath, Esquire, then and there as such judge as aforesaid, having competent and sufficient lawful power and authority to administer the said oath to the said D. C. G. in that behalf; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said D. C. G. being so sworn as aforesaid, was then and there examined upon his own behalf, upon the hearing and trial as aforesaid, and not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and devising and wickedly contriving and intending to pervert the due course of law and justice by his perjury hereinafter mentioned, then and there, on his examination aforesaid, upon the said hearing and trial as aforesaid, to wit, at the parish of St. George, Bloomsbury aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, before the said Douglas Denon Heath, Esquire, as such judge as aforesaid, upon his oath aforesaid, unlawfully,

*Precedents.*

No. VII.  
Indictment for  
perjury in the  
County Court.

*Precedents.*

No. VII.  
Indictment for  
perjury in the  
County Court.

falsely, corruptly, knowingly, wilfully and maliciously, did say, depose, swear and give evidence in substance and to the effect following, that is to say, "that the said G. J. had then stolen the said writing, bearing the said signature of E. L., and the said paper writing containing such list of charges as aforesaid, and also the said letter bearing the signature C. S., from him the said D. C. G.," whereas, in truth and in fact, the said G. J. had never stolen the said last-mentioned writings and letter, or either of them, from him the said D. C. G. as he the said D. C. G. so said, deposed, swore, and gave evidence as aforesaid; and whereas, in truth and in fact, at the time the said D. C. G. so said, deposed, swore and gave evidence as aforesaid, he the said D. C. G. had voluntarily parted with and given up the possession of the said last-mentioned writings and letters to the said G. J., as he the said D. C. G. at the time he so said, deposed, swore and gave evidence as aforesaid, well knew, and so the jurors aforesaid, upon their oath aforesaid, do say that the said D. C. G. on the said 17th day of January, in the year of our Lord 1850, in the Bloomsbury County Court of Middlesex aforesaid, at the parish of St. George, Bloomsbury aforesaid, in the county of Middlesex aforesaid, and within the jurisdiction of the said Central Criminal Court, upon his examination, upon oath as aforesaid, before the said Douglas Denon Heath, Esquire, as such judge as aforesaid, upon the hearing and trial of the said action as aforesaid, he the said Douglas Denon Heath, Esq., then and there having such competent and sufficient lawful power and authority to administer the said oath to the said D. C. G. in that behalf as aforesaid, of his own will and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, unlawfully, falsely, knowingly, corruptly, wilfully and maliciously, did give false evidence, and commit wilful and corrupt perjury to the great displeasure of Almighty God; to the evil and pernicious example of all others in the like case offending against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

No. VIII.

*Indictment under the 7 & 8 Geo. 4, c. 29, s. 23, for stealing deeds evidencing the title to real estate; with counts for conspiracy.*

CENTRAL Criminal Court, } The jurors for our Lady the Queen  
to wit. } upon their oath present, that John  
Lawrence, late of the parish of Saint George, Hanover-square, in the  
county of Middlesex, and within the jurisdiction of the Central Criminal  
Court, labourer, and a certain other evil-disposed person whose name is  
to the jurors aforesaid unknown, on the 25th day of April in the  
year of our Lord 1850, at the parish aforesaid, in the county aforesaid,  
and within the jurisdiction of the said court, one parchment partly  
written and partly printed, the property of one Seth Smith, and then  
and there being evidence of part of the title of the said S. S. to a certain  
real estate, that is to say, a house and land situate and being No. 2,

Motcombe-street, in the parish aforesaid, in the county aforesaid, in which said real estate the said S. S. then and there had and still hath a present interest, then and there being found, then and there unlawfully did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Precedents.*

No. VIII.  
Indictment for  
stealing title  
deeds of an  
estate.

*Second Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. L. and the said evil-disposed person whose name is to the jurors aforesaid unknown, afterwards, to wit, on the same day and in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, one parchment partly written and partly printed, the property of the said S. S., to wit, a counterpart of a lease of a house and land situate and being No. 2, Motcombe-street, in the parish aforesaid, in the county aforesaid, bearing date the 6th day of April in the year of our Lord 1830, being evidence of part of the title of the said S. S. to a certain real estate, to wit, the said last-mentioned house and land in which said real estate the said S. S. then and there had and still hath a present interest, then and there being found, then and there unlawfully did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Second count.

*Third Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. L. and the said evil-disposed person whose name is to the jurors aforesaid unknown, afterwards, to wit, on the same day and in the year first aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, one parchment partly written and partly printed, the property of the said S. S., and then and there being evidence of part of the title of Richard, Marquis of Westminster, to a certain real estate, to wit, a house and land situate and being No. 2 in Motcombe-street, in the parish aforesaid, in the county aforesaid, in which said real estate the said Richard, Marquis of Westminster then and there had and still hath a present interest, then and there being found, then and there unlawfully did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Third count.

*Fourth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. L. and the said evil-disposed person whose name is to the jurors aforesaid unknown, afterwards, to wit, on the same day and in the year first aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, one parchment partly written and partly printed, the property of the said S. S., and then and there being evidence of part of the title of the said Richard, Marquis of Westminster, to a certain real estate, to wit, a house and land situate and being No. 2, in Motcombe street, in the parish aforesaid, in the county aforesaid, in which said real estate the said S. S. then and there had and still hath a present interest, then and there being found, then and there unlawfully did steal, take and carry away, against the form of the statute in that case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Fourth count.

*Fifth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that at the time of the committing of the offence hereinafter in this count mentioned, a certain counterpart of lease, bearing date the 6th day of April, in the year of our Lord 1830,

Fifth count.

*Precedents.*

No. VIII.  
Indictment for  
stealing title  
deeds of an  
estate.

had been duly executed by the said J. L., under his hand and seal, whereby the said J. L., for himself, his executors, administrators and assigns had covenanted to pay to the said S. S., his executors, administrators and assigns, a certain yearly rent for and in respect of a house and premises situate and being No. 2, Motcombe-street, in the parish aforesaid, in the county aforesaid, for and during a certain term of years which had not then expired. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said counterpart of lease then and there was in the custody and possession of Charles Pitt Bartley and others, as solicitors for the said S. S., to wit, at the parish aforesaid in the county aforesaid, he the said S. S. then and there being the owner of the said counterpart of lease, and being then and there lawfully entitled to receive the rent thereby reserved. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. L., and the said evil-disposed person whose name is to the jurors aforesaid unknown, well knowing the premises, on the day and year first aforesaid, at the parish aforesaid in the county aforesaid, and within the jurisdiction of the said court, unlawfully and wickedly did conspire, confederate and agree together to cheat, defraud and prejudice the said S. S., by fraudulently, deceitfully and wrongfully obtaining possession of the said counterpart of lease, and fraudulently, deceitfully and wrongfully destroying the said counterpart of lease, to the great damage and prejudice of the said S. S., to the evil example of all others, in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

Sixth count.

*Sixth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that before and at the time of the committing of the offence hereinafter in this count mentioned, the said J. L. was lawfully possessed of a certain lease in writing, bearing date the 6th of April, in the year of our Lord 1830, by which said lease, the said S. S. did demise a certain house and premises, situate and being No. 2, Motcombe-street, in the parish aforesaid, in the county aforesaid, to the said J. L., his executors, administrators and assigns, for the term of twenty-one years from Lady-day then last. And the jurors aforesaid, upon their oath aforesaid, do further present, that a counterpart of the said lease was, at the time of the granting of the said lease, executed by the said J. L., which counterpart of lease, under the hand and seal of the said J. L., was at the time of the committing of the offence hereinafter in this count mentioned, in the possession and custody of the said C. P. B. and others, who then and there were the solicitors of the said S. S., he the said S. S. being then and there the owner of the said counterpart of lease, and of the premises thereby demised, to wit, at the parish aforesaid, in the county aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. L., and the said evil-disposed person whose name is to the jurors aforesaid unknown, well knowing the premises, on the same day, and in the year first aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, and whilst the said S. S. was such owner as aforesaid, unlawfully and wickedly did conspire, confederate and agree together, to defraud and prejudice the said S. S. by altering the word twenty in the said lease to the word seventy, so as to make the term of years granted in and by the said lease appear to be seventy-one instead of twenty-one, and by falsely and fraudulently pretending that the said J. L. was entitled, under the said lease, to the house and premises thereby demised for a term of seventy-one

years. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. L., and the said evil-disposed person whose name is to the jurors aforesaid unknown, to wit, on the same day, and in the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, in pursuance of, and according to, the unlawful conspiracy, confederacy and agreement so had and made between them as aforesaid, unlawfully and wickedly did endeavour to persuade and induce one John W. Jones, who then was a clerk and servant of the said C. P. B. and others, to purloin from the said C. P. B. and others the said counterpart of the said lease, and to deliver the said counterpart to the said J. L., in order that the said J. L., and the said evil-disposed person whose name is to the jurors aforesaid unknown, might then and there destroy and make away with the said counterpart to the great damage and prejudice of the said S. S., to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

*Precedents.*

No. VIII.  
Indictment for  
stealing title  
deeds of an  
estate.

*Seventh Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. L., and the said evil-disposed person whose name is to the jurors aforesaid unknown, afterwards, to wit, on the day and in the year first aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully and wickedly did conspire, confederate and agree together, to cheat, defraud and prejudice the said S. S. by falsely and fraudulently altering a certain lease of a house and premises, situate and being No. 2, Motcombe-street, in the parish aforesaid, in the county aforesaid, which said lease had been theretofore granted by the said S. S. to the said J. L. for the term of twenty-one years, and by a certain false and fraudulent alteration to make the said lease appear to have been granted by the said S. S. to the said J. L. for the term of seventy-one years, to the great damage and prejudice of the said S. S., to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

*Seventh count.*

*Eighth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. L., and the said evil-disposed person whose name is to the jurors aforesaid unknown, afterward, to wit, on the same day and in the year first aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully and wickedly did conspire, confederate and agree together, by divers fraudulent and corrupt practices and contrivances, to obtain of and from the said C. P. B. and others, a certain counterpart of lease, executed by the said J. L., and the property of the said S. S., and of great value, to wit, of the value of 100*l.* with intent then and there and thereby to deprive the said S. S. of the said counterpart of lease, and to cheat and defraud him of his moneys, to the great damage of the said S. S., to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

*Eighth count.*

*Ninth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. L., and the said evil-disposed person whose name is to the jurors aforesaid unknown, on the day and year first aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully and wickedly did conspire, confederate and agree together, by divers fraudulent schemes and devices, to obtain to themselves a certain counterpart of lease of great value, to wit, of the value of 100*l.*, the property of the said S. S., with intent then and there to cheat and defraud the said S. S. of the same, to the great damage, prejudice and injury of the said S. S., to the evil example of all others in

*Ninth count.*



*Precedents.*

No. VIII.  
Indictment for  
stealing title  
deeds of an  
estate.

Tenth count.

the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

*Tenth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. L., and the said evil-disposed person, whose name is to the jurors aforesaid unknown, afterwards, to wit, on the day and year first aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully and wickedly did conspire, confederate and agree together, by divers fraudulent schemes and subtle contrivances, to cheat and defraud the said S. S. of his moneys, to the great damage, prejudice and injury of the said S. S., to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

#### No. IX.

*Indictment under the 6 & 7 Vict. c. 96, for threatening to publish a Libel with intent to extort Money. (a)*

CENTRAL Criminal Court, } The jurors for our Lady the Queen,  
to wit. } upon their oath present, that heretofore his late Majesty King Charles the Second, to wit, on the 2nd day of May, in the 22nd year of his reign, by his letters patent bearing date at Westminster the day and year aforesaid, duly sealed in that behalf, to wit, with the great seal of England, and by writ of privy seal, after reciting that certain persons, in the said letters patent mentioned, had, at their own great costs and charges, undertaken an expedition for Hudson's Bay [*here portions of the letters patent were set out.*]

And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making and granting of the said letters patent as aforesaid, and at the time of the committing of the offence by one John McLaughlin, hereinafter next mentioned, to wit, on the day and year in that behalf after mentioned, the said letters patent were in full force and unrepealed, and the said body corporate were trading under the same, and having receiving, possessing, enjoying and retaining the privileges, liberties, jurisdictions and franchises thereby granted to the said body corporate. And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making and granting of the said letters patent, and before and at the time of the committing of the said offence by the said John McLaughlin, as hereinafter next mentioned, one Sir John Henry Pelly, baronet, was the governor of the said body corporate and politic under the said letters patent. And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making and granting of the said letters patent, and

(a) The defendant was arraigned on this indictment at the January Session of the Central Criminal Court; but it was, on the objection being taken, conceded by the counsel for the prosecution, that the above act did not apply to the case of a libel on a corporation, and the defendant was acquitted. It is thought, however, from the special nature of the libel itself, and the unusual matters set out, that the form may be of some value to the practitioner.

before and at the time of the committing of the said offence, to wit, on the day and year in that behalf after-mentioned, one Andrew Colville, Esq., was, under the said letters patent, deputy-governor of the said company and body corporate and politic. And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making and granting of the said letters patent, and before and at the time of the committing of the said offence, to wit, on the day and year in that behalf after-mentioned, seven of the then members of the said company and body corporate and politic, that is to say, Benjamin Harrison, Esq., John Halkett, Esq., Henry Hulse Berens, Esq., Aaron Chapman, Esq., Edward Ellice, Esq., The Right Hon. Dunbar James, Earl of Selkirk, and Alexander Weynton, Esq., were a committee of the said company and body corporate under the said letters patent.

*Precedents.*  
—  
No. IX.  
Indictment for threatening to publish a libel with intent to extort money.

And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making and granting of the said letters patent, and before the committing of the offence by the said John Mc Laughlin hereinafter next mentioned, to wit, on the 1st day of January, in the year of our Lord 1810, the then governor of the said body corporate, and the said body corporate, duly erected and established under the said letters patent a certain colony, called the Red River Colony, at the Red River, being one of the places and within the limits and bounds granted by the said letters patent as aforesaid, which said colony, so erected and established as aforesaid, was at the time of the committing of the said offence hereinafter mentioned, to wit, on the day and year in that behalf after-mentioned, continued and established under the said letters patent, and the said Sir John Henry Pelly, Baronet, Andrew Colville, Esq., Benjamin Harrison, Esq., John Halkett, Esq., Henry Hulse Berens, Esq., Aaron Chapman, Esq., Edward Ellice, Esq., the Right Honourable Dunbar James, Earl of Selkirk, and Alexander Weynton, Esq., were, under the said letters patent, managing and handling the business affairs and things of the said company, and body corporate and politic, in and respecting and concerning the said colony, called the Red River Colony, at the time of the committing of the offence hereinafter mentioned, to wit, on the day and year in that behalf after mentioned. And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making and granting of the said letters patent, and before the committing of the said offence, to wit, on the 1st day of January, in the year of our Lord 1840, and on divers other days and times between that day and the committing of the said offence, the then governor and body corporate and politic, under and by virtue of the said letters patent, and as they were empowered thereby, did levy divers, to wit, 500 duties at and in the said colony, called the Red River Colony. And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making and granting of the said letters patent, and before the committing of the said offence, to wit, on the 1st day of January, in the year of our Lord 1840, and on divers other days and times between that day and the committing of the said offence, the then governor of the said body corporate, and the said body corporate did, under and by virtue of the said letters patent, make, ordain and constitute divers, to wit, 1000 reasonable laws, constitutions, orders and ordinances, for the good government of the said body corporate, and for regulating the trade to and with the said colony, called the Red River Colony, and otherwise. And the jurors aforesaid, upon their oath aforesaid, do further present, that the governor for the time being of the said body corporate, and the said body corporate, since the

*Precedents.*

No. IX.  
Indictment for  
threatening to  
publish a libel  
with intent to  
extort money.

making and granting of the said letters patent, and before the committing of the said offence, to wit, on the said 1st day of January, in the year of our Lord 1840, and on divers other days and times between that day and the committing of the said offence, carried and conveyed for reasonable reward to the said body corporate in that behalf, divers goods and merchandize from divers, to wit, fifty ports in England, to a place called York Factory, being one of the places, and within the limits and boundaries, by the said letters patent as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making and granting of the said letters patent, and before the committing of the said offence, to wit, on the 1st day of January, in the year of our Lord 1840, and on divers other days and times between that day and the committing of the said offence, the then governor and body corporate levied divers, to wit, fifty duties upon certain goods then imported into York Factory aforesaid, as the said governor and body corporate were empowered to do by the said letters patent. And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making and granting of the said letters patent, and before and at the time of the committing of the said offence, to wit, on the 1st day of January, in the year of our Lord 1840, and on divers other days and times between that day and the committing of the said offence, divers, to wit, 50,000 persons came to, and did live, inhabit, reside, and settle at the Red River Colony aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making and granting of the said letters patent, and before the committing of the said offence, to wit, on the said 1st day of January, in the year of our Lord 1840, and on divers other days and times between that day and the committing of the said offence, divers, to wit, 50,000 persons then inhabiting, living, and residing at the Red River Colony aforesaid, were known and called, from divers causes, "half-breeds." And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making and granting of the said letters patent, and before the committing of the said offence, to wit, on the 1st day of January, in the year of our Lord 1840, and on divers other days and times between that day and the committing of the said offence, the then governor of the said body corporate, and the said body corporate, duly appointed and established under and by virtue of the said letters patent, divers, to wit, two judges, six magistrates, and twenty policemen, in and for, and to act in and for, the county aforesaid, called the Red River Colony. And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making and granting of the said letters patent, and before the committing of the said offence, to wit, on the 1st day of January, in the year of Lord 1840, the then governor of the said body corporate, and the said body corporate, under and by virtue of the said letters patent, constituted, established and appointed divers, to wit, twelve persons to attend to the affairs and business of the said body corporate, at and in the colony aforesaid, called the Red River Colony, and which last-mentioned persons were acting under such appointment, before and at the time of the committing of the said offence, to wit, on the day and year after-mentioned, and were then called, as known, as the counsel of Ajjinihoia, all of which facts J. M. L. hereafter-mentioned, before and at the time of the committing of the said offence, to wit, on the day and year after-mentioned, had notice. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. M. L., late of the parish of St. Benet, Gracechurch, in the city of

London, and within the jurisdiction of the said Central Criminal Court, labourer, after the making and granting of the said letters patent, and after all the acts aforesaid had been done, and facts and matters aforesaid taken place as aforesaid, and after the said J. M. L. had had notice of the same as aforesaid, and after the 1st day of November, in the year of our Lord 1843, to wit, on the 14th day of February, in the year of our Lord 1846, at the said parish of St. Benet, Gracechurch, in the said city of London, and within the jurisdiction of the said Central Criminal Court, did unlawfully, knowingly and wilfully, with intent then and there, and within the jurisdiction of the said Central Criminal Court, to extort a large sum of money, to wit, the sum of 1,000*l.*, from the said body corporate and politic, threaten to print and publish certain matters and things touching and concerning the said body corporate and politic, and touching and concerning the matters, acts, facts and things aforesaid, that is to say, that the Hudson's Bay Company (meaning the said body corporate and politic, called the Governor and Company of Adventurers of England trading into Hudson's Bay), refuse British subjects in a British colony (meaning the said colony established as aforesaid under the said letters patent) the same privileges allowed by the English Government to British subjects in other colonies. "This company (meaning the said company and body corporate) levies duties different to what are usually levied in the provinces, amounting to a prohibition (meaning that the said duties so levied under the said letters patent as first aforesaid, amounted to a prohibition.) It (meaning thereby the said company and body corporate) makes laws to suit its (meaning the said body corporate's) own purposes (meaning thereby that some of the said laws, as made under the said letters patent as aforesaid, were made to suit the said body corporate's) own purposes. Four times the freight is charged from England to York Factory more than to any other port in the British provinces (meaning thereby that the said body corporate charged a greater freight for the said carriage and conveyance of goods and merchandize from the said ports in England to York Factory aforesaid, than the said body corporate ought to have charged.) A duty of 20 per cent. has been levied upon all goods coming into York Factory (meaning thereby that a duty of 20 per cent. had, before the committing of the said offence, been levied upon the said goods imported into York Factory as aforesaid), by the said duties so levied upon such goods as aforesaid. In its (meaning the said body corporate's) transactions with the settlers (meaning the said persons so living, inhabiting, residing and settling in the said colony as first aforesaid, before and at the time of the committing of the said offence) every advantage is taken and there is no manner of appeal. That every obstacle is thrown in the way of exportation to England and importation to the United States, or any enterprise taken in hand by the settlers (meaning the said persons so living, inhabiting, residing and settling in the said colony as last aforesaid, at the time of the committing of the said offence): half-breeds (meaning the said persons inhabiting, living and residing in the colony, called the Red River Colony aforesaid, at the time of the committing of the said offence, called half-breeds as aforesaid) are held as an inferior race, and kept down like negroes (meaning thereby that the said body corporate, at the time of the committing of the said offence, held and used the said persons, called half-breeds, as an inferior race to the rest of the persons then residing, inhabiting, and settling in the said colony, called the Red River Colony as aforesaid.) Settlers (meaning thereby the said persons living, inhabiting, residing and settling in the said colony

*Precedents.*

No. IX.

Indictment for threatening to publish a libel with intent to extort money.

*Precedents.*

No IX.  
Indictment for  
threatening to  
publish a libel  
with intent to  
extort money.

as first aforesaid, at the time of the committing of said offence) are prohibited from trading with the Indians, or in furs with one another (meaning thereby that the said body corporate had so prohibited such last-mentioned persons.) They are prohibited from trading without the bounds of the settlement (meaning the said colony), or selling their furs to traders in opposition to the company (meaning the said body corporate), although a much larger price is generally received for them from these traders (meaning that the said last-mentioned persons were so prohibited as last aforesaid by the said body corporate, by their said laws so made as aforesaid): that the Fur Trade Council of Rupert's Land makes laws for the colony (meaning the colony called the Red River Colony aforesaid): that threats have been used to induce settlers (meaning some of the said persons living, inhabiting, residing and settling in the said colony as first aforesaid), to sign land deeds: that the chief magistrate (meaning one of the said magistrates so appointed for, and to act in the said colony as aforesaid) of the colony (meaning the said colony), is a chief factor in the company (meaning the said body corporate): that as such he must be opposed to the interests of that colony (meaning the said colony): that the recorder or judge (meaning one of the said judges so appointed and established for and to act in the said colony as aforesaid) is appointed and paid by the company (meaning the said body corporate), and holds its offices at its (meaning the said body corporate) will: that as such his interests are identified with the company's (meaning thereby the said body corporate): that there being no other counsel, his charge must materially affect the jury: that all the magistrates (meaning some of the said magistrates so appointed and established as aforesaid) hold some office or other from the company (meaning thereby the said body corporate): that the sheriff (thereby meaning one of the said magistrates so appointed and established as and to act for the said colony, under the said letters patent as aforesaid) is a magistrate also, and holds sundry offices which proceed from the company (meaning thereby the said body corporate): that the council (meaning thereby the said persons so constituted, established and appointed to attend to the said affairs and business of the said body corporate in the said colony) is composed of individuals subservient to, and appointed by the company (meaning thereby the said body corporate), and all holding some annuity or other from it, with the exception of two individuals: that an immense corps of policemen (meaning some of the said policemen so appointed and established as aforesaid) are kept up and paid from the revenue of the colony (meaning the said colony), who are neither required nor wanted for the peculiar purposes of the company (meaning thereby the said body corporate): that numbers of these policemen were discharged last May without payment of their salaries, because they attended a public demonstration: that another was discharged simply because he acted as interpreter to an American: that a charge was brought against another which could not be substantiated, and when about to be paid his salary, word was brought in to the magistrates from the governor (meaning the said Sir John Henry Pelly, baronet), that it was his wish he should be discharged, and notwithstanding his innocence, the poor fellow lost his salary." And the jurors aforesaid, upon their oath aforesaid, do further present, that the said matters and things, and each and every of them, at the time of the committing of the said offence, to wit, on the day and year in that behalf aforesaid, touched, and concerned and related to the said body corporate,

and the matters, facts and things aforesaid, contrary to the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Precedents.*

No. IX.  
Indictment for threatening to publish a libel with intent to extort money.

### No. X.

*Indictment under the 59 Geo. 3, c. 69, for equipping a Vessel to be employed in the service of a Foreign State against another State with which this country is at peace; with counts for conspiracy.*

**C**ENTRAL Criminal Court, } The jurors for our Lady the Queen, First count.  
to wit. } upon their oath present, that Giovanni Granatelli, late of the parish of Saint John, Wapping, in the county of Middlesex, and within the jurisdiction of the Central Criminal Court, Esquire, commonly called Prince Granatelli, Lewis Scalia, late of the same place, Esquire, Salvadore D'Amico, late of the same place, gentleman, and John Moody, late of the same place, gentleman, on the 1st day of February, in the year of our Lord 1849, with force and arms, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, and without the leave and license of our said Lady the Queen for that purpose first had and obtained, either under the sign manual of her said Majesty, or signified by order in council, or by proclamation of her said Majesty, or in any other manner whatever, did furnish, equip, and fit out a certain vessel called "The Bombay," with intent and in order that the said vessel should be employed in the service of certain foreign people then inhabiting a certain foreign country, to wit, the Island of Sicily, and with intent to commit hostilities against a certain prince, to wit, Ferdinand the First, king of the kingdom of the two Sicilies, with whom our said Lady the Queen was not then at war, against the form of the statute in such case made and provided, to the great danger of the peace and welfare of this kingdom, and against the peace of our said Lady the Queen, her crown and dignity.

The *second count* charged an intent to be employed in the service of Giuseppe La Farina, and the Marquis of Torresara, then assuming the government of Sicily. Second count.

The *Third and Fourth counts* charged the intent to serve each respectively. Third and fourth counts.

*Fifth Count.*—To serve certain persons unknown, to wit, the Sicilian people. Fifth count.

*Sixth Count.*—To serve a certain foreign people in a foreign country, to wit, Sicily, against the subjects and citizens of Ferdinand. Sixth count.

*Seventh, Eighth, and Ninth Counts.*—To serve Guiseppe La Farina, and the Marquis Torresara (together and separately), assuming government over Sicilian people. Seventh, eighth, and ninth counts.

*Tenth Count.*—To serve persons unknown, against the subjects of Ferdinand. Tenth count.

The ten following counts varied from the first ten in alleging an *attempt and endeavour* to furnish, equip, and fit out "The Bombay."

*Precedents.*

No. X.  
Indictment for  
equipping a  
vessel to be  
employed in the  
service of a  
foreign state  
against another  
state, &c.

Twenty-first  
count.

*Twenty-first Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Giovanni Granatelli, Lewis Scalia, Salvatore D'Amico, and John Moody, afterwards, to wit, on the day and year aforesaid, with force and arms, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, and without the leave and license of our said Lady the Queen for that purpose first had and obtained, either under the sign manual of our said Lady the Queen, or signified by order in council, or by proclamation of her said Majesty, or in any other manner whatever, did procure to be equipped, furnished and fitted out, and unlawfully and knowingly did aid and assist, and were concerned in the equipping, furnishing and fitting out of a certain vessel called "The Bombay," with intent and in order that the said vessel should be employed in the service of certain foreign people then inhabiting a certain foreign country, to wit, the Island of Sicily, with intent to commit hostilities against a certain prince, to wit, Ferdinand the First, king of the kingdom of the Two Sicilies, with whom our said Lady the Queen was not then at war, against the form of the statute in such case made and provided, to the great danger of the peace and welfare of this kingdom, and against the peace, &c.

The next nine counts vary, as those from the second to the tenth.

Thirty-first  
count.

*Thirty-first Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Giovanni Granatelli, Lewis Scalia, Salvatore D'Amico, and John Moody, afterwards, to wit, on the day and year aforesaid, with force and arms, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully and without the leave and license of our said Lady the Queen for that purpose first had and obtained, either under the sign manual of our said Lady the Queen, or signified by order in council, or by proclamation of her said Majesty, or in any other manner whatever, did furnish, equip and fit out a certain vessel called "The Bombay," with intent and in order that the said vessel should be employed in the service of certain foreign people then inhabiting a certain foreign country, to wit, the Island of Sicily, as a transport against a certain prince, to wit, Ferdinand the First, king of the kingdom of the Two Sicilies, with whom our said Lady the Queen was not then at war, against the form of the statute in such case made and provided, to the great danger of the peace and welfare of this kingdom, and against the peace, &c.

*Thirty-first to Fortieth*, same variations as in the first ten; *Forty-first to Fiftieth*, charged an *attempt* and *endeavour* to equip and fit out "The Bombay" as a transport, with like variations.

Sixty-first  
count.

*Sixty-first Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Giovanni Granatelli, Lewis Scalia, Salvatore D'Amico, and John Moody, not regarding the laws of this realm, afterwards, to wit, on the 20th day of December, in the year of our Lord 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully did conspire, combine, confederate and agree together with divers other evil-disposed persons, whose names are to the jurors aforesaid as yet unknown, unlawfully, knowingly and contrary to the form of the statute in such case made and provided, without the leave and license of our said Lady the Queen, for that purpose first had and obtained, either under the sign

manual of our said Lady the Queen, as signified by order in council, or by proclamation of Her said Majesty, or in any other manner whatsoever, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, to equip, furnish and fit out, and procure to be equipped, furnished and fitted out, two vessels, respectively called the Bombay and the Vectis, with intent and in order that the said vessels in this count mentioned, should be employed in the service of a certain people then inhabiting a certain foreign country, to wit, the Island of Sicily, and should be employed in committing hostilities against a certain prince, to wit, Ferdinand the First, King of the kingdom of the Two Sicilies, and his citizens and subjects, at a time when our said Lady the Queen was not, nor should be at war with the said Prince, in contempt of our said Lady the Queen, and her laws, to the evil example of all others in the like case offending, to the great danger of the peace and welfare of this kingdom, and against the peace, &c.

*Precedents.*

No. X.  
Indictment for equipping a vessel to be employed in the service of a foreign state against another state, &c.

62nd to 70th, like variations.

*Seventy-first Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Giovanni Granatelli, Lewis Scalia, Salvadore D'Amico, and John Moody, not regarding the laws of this realm, afterward, to wit, on the said 20th day of December, in the year 1848, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully did conspire, combine, confederate and agree together, and with divers other persons whose names to the jurors are as yet unknown, unlawfully, and according to the form of the statute in such case made and provided, within the United Kingdom of Great Britain and Ireland, to hire, retain, engage and procure divers persons to the jurors aforesaid unknown, to engage to serve and be employed in warlike and military operations as soldiers in land service, for and in aid of certain foreign people, to wit, the Sicilian people, in contempt of our said Lady the Queen, and her law, and to the evil and pernicious example of all others in the like case offending, to the great danger of the peace and welfare of this kingdom, and against the peace, &c.

Seventy-first count.

#### No. XI.

*Indictment against an inhabitant of a ward in the city of London, for refusing to execute the office of one of the wardmote inquest.*

LONDON, } The jurors for our Lady the Queen, upon their oath, to wit. } present, that the city of London is an ancient city, and that according to the custom of the said city, from time whereof the memory of man is not to the contrary, used and approved in the same, at a court of wardmote holden for the ward of Aldersgate, in London (that is to say) at the Royal General Dispensary, in Aldersgate-street (to wit) in the parish of Saint Botolph without Aldersgate, in the ward of Aldersgate, aforesaid, in London, aforesaid, according to the custom of



*Precedents.*

No. XI.  
Indictment for  
refusing to  
execute the  
office of one of  
the wardmote  
inquest.

the said city and court aforesaid, on the 21st day of December, in the thirteenth year of the reign of our Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, before the worshipful Sir Peter Laurie, Knight, then and now one of the aldermen of the said city, and then and yet alderman of the said ward ; one W. H., late of London, fancy cabinet-maker, then and long before being an inhabitant, and residing in the parish of Saint Botolph without Aldersgate, in the ward of Aldersgate, aforesaid, in London, aforesaid, and a fit and proper person to execute the office of one of the inquest of the said ward, called the wardmote inquest, was lawfully and in due manner according to the custom of the said city and court of wardmote aforesaid, than and there elected to be one of the inquest called the wardmote inquest, for and within the said ward for one whole year then next ensuing, by the men inhabiting and resident, paying scot, and bearing lot within the said ward, whereof the said W. H., afterward (to wit) on the 21st day of December, in the year aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition at London aforesaid (that is to say) at the parish aforesaid, in the ward of Aldersgate aforesaid, in London aforesaid, had notice ; nevertheless the said W. H., little regarding his duty in this behalf, but endeavouring and intending as much as in him lay, totally to hinder and retard the due execution of justice and the preservation of peace and good order, from the said 21st day of December, in the year aforesaid, to the day of the taking of this inquisition, hath unlawfully, knowingly, voluntarily, obstinately and contemptuously, wholly refused, denied and neglected to take upon himself the said execution of the said office of one of the wardmote inquest in and for the said ward, although duly requested so to do, against his said duty (to wit) at London, aforesaid, in the parish aforesaid, in the ward aforesaid, in London aforesaid ; in manifest contempt and delay of justice, to the bad example of all other persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

*Second count.*

*Second Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. H., on the said 21st day of December, in the year aforesaid, and long before, and always after, until the day of the taking of this inquisition, was inhabiting and resident, paying scot, and bearing lot within the parish of Saint Botolph without Aldersgate, in the ward of Aldersgate, in London, aforesaid, and that within the ward aforesaid there is, and from time whereof the memory of man is not to the contrary, there hath been a certain court of our said Lady the Queen and her predecessors, called the wardmote, held, and to be held, in every year upon the feast-day of Saint Thomas the Apostle, unless the said feast happened to be or fall on a Sunday ; and, in that case, upon the day next following such Sunday, before the Alderman of the ward aforesaid, for the time being, or his deputy (to wit) at London aforesaid, in the parish and ward last aforesaid, in which said court of wardmote, according to the custom within the said ward, for all the time aforesaid, used and approved (to wit) in the parish and ward aforesaid, in London aforesaid, all the men inhabiting and resident, paying scot, and bearing lot for the time being within the ward aforesaid, have been accustomed and ought, and were bound by reason of their residence there to appear in the said court and do their suit there, and in the said court of wardmote, according to the custom of the said ward and of the court of wardmote aforesaid, yearly, for all the time aforesaid, the men inhabiting

and resident, paying scot, and bearing lot for the time being, within the ward aforesaid, were accustomed and ought to appoint and choose divers persons inhabiting and resident, paying scot, and bearing lot within the ward aforesaid, to be an inquest in and for the said ward, for inquiring of and presenting for the public good, divers defaults and offences committed and to be committed within the said ward, every of which said persons so as aforesaid chosen, were used and accustomed and ought to hold the said office last-mentioned (to wit) at London aforesaid, in the ward aforesaid, for the year then next ensuing. And the jurors aforesaid, upon their oath, aforesaid, further present that the said W. H., on the said 21st day of December, in the year aforesaid, in the court of wardmote, then held for the ward aforesaid, in the said parish of Saint Botolph without Aldersgate, in the ward aforesaid, in London aforesaid, before the said Sir Peter Laurie, Knight, then and now one of the aldermen of the said city, and then and yet alderman of the said ward lawfully and duly, by the men inhabiting and resident, paying scot, and bearing lot within the said ward, according to the custom of the said ward, and the court of wardmote aforesaid, for all the time aforesaid used, was elected into the said office of one of the inquest last mentioned, for one whole year then next ensuing (that is to say) until the feast-day of Saint Thomas the Apostle then next following; and the jurors aforesaid, upon their oath aforesaid, further present that the said W. H., afterwards (to wit) on the said 21st day of December, in the year aforesaid, at London aforesaid (to wit) at the parish of Saint Botolph without, Aldersgate, in the ward aforesaid, in London aforesaid, had notice thereof, and was then and there duly required to appear among others in the court holden before the mayor and aldermen of the said city in the Guildhall of the said city of London, on Monday next after the feast of the Epiphany then next following, to make due presentment of all offences in that behalf presentable within the ward aforesaid, for the public good; nevertheless the said W. H., little regarding his said duty in this behalf, but intending and endeavouring the due execution of his said office last-mentioned totally to neglect, continually after his said election into the said office, until the day of taking of this inquisition (although often requested) and on the said Monday next, after the feast of the Epiphany at London, aforesaid (to wit) at the parish and ward aforesaid, in London aforesaid, to make his appearance as aforesaid, or to make any such presentment as aforesaid, or his said office in any manner to execute, unlawfully, voluntarily, obstinately and contemptuously, hath altogether refused and denied, and yet doth refuse and deny against his said duty, in manifest contempt of our said Lady the Queen and her laws, to the bad example of all other persons in the like case offending and against the peace of our said Lady the Queen her crown and dignity.

*Third Count.*—And the jurors aforesaid upon their oath aforesaid Third count. further present, that the said W. H., on the said 21st day of December, in the year aforesaid, and long before and always after, until the day of the taking of this inquisition, was inhabiting and resident, paying scot, and bearing lot within the said parish of Saint Botolph without Aldersgate, in the ward of Aldersgate aforesaid, in London aforesaid, and that within the said ward there is, and from time whereof the memory of man is not to the contrary, there hath been a certain court of our Lady the now Queen, and her predecessors, called the Wardmote, held and to be held in every year upon the Feast of Saint Thomas the Apostle (unless the said feast happened to be or fall on a Sunday, and in such case, upon

*Precedents.*

No. XI.  
Indictment for  
refusing to  
execute the  
office of one of  
the wardmote  
inquest.

*Precedents.*

No. XI.  
Indictment for  
refusing to  
execute the  
office of one of  
the wardmote  
inquest.

the day then next following such Sunday), before the aldermen of the ward aforesaid for the time being, or his deputy, to wit, at London aforesaid, in the parish and ward aforesaid, in London aforesaid; in which said court, according to the custom within the said ward, for all the time aforesaid, used and approved at the said parish of Saint Botolph without Aldersgate, in the ward of Aldersgate aforesaid, in London aforesaid, all the men inhabiting and resident, paying scot, and bearing lot for the time aforesaid, within the ward aforesaid, have been used and accustomed, and ought and were bound by reason of their residence there, to appear in the said court, and do their suit there (to wit), at London aforesaid, in the ward aforesaid, and the said court, according to the custom of the said ward, and of the Court of Wardmote aforesaid, yearly, for all the time aforesaid, the said men inhabiting and resident, paying scot, and bearing lot within the ward aforesaid, were used and accustomed, and ought to appoint and choose divers persons (to wit), men inhabiting and resident, paying scot and bearing lot within the ward aforesaid, jurymen of the said ward, to make an inquest for the inquiring of and presenting for the public good, divers defaults and offences committed and to be committed within the said ward, and which said persons so appointed and chosen, were used and accustomed, and ought on the Monday next after the feast of the Epiphany, next after their said election, to make due presentment of all offences in that behalf presentable within the said ward, for the public good, at the Guildhall of the said city, in the court there held, before the mayor and aldermen of the said city for the time being, for all the time aforesaid (to wit), at London aforesaid, in the ward aforesaid; and the jurors aforesaid, upon their oath aforesaid, further present, that the said W. H., on the 21st day of December, in the year aforesaid, in the said Court of Wardmote, then held for and within the said ward (to wit), at the parish of Saint Botolph without Aldersgate aforesaid, in the ward of Aldersgate aforesaid, in London aforesaid, before the said Sir Peter Laurie, Knight, then and now one of the aldermen of the said city, and then and yet alderman of the said ward, according to the custom of the same ward and court aforesaid, for all the time aforesaid used, was duly elected into the office of one of the wardmote inquest, in and for the said ward of Aldersgate, to serve on the said inquest for the ward aforesaid, for the year then next ensuing (that is to say), until the Feast of Saint Thomas the Apostle then next following. And the jurors aforesaid, upon their oath aforesaid further present, that the said W. H. afterwards (to wit), on the said 21st day of December, in the year aforesaid, at London aforesaid (to wit), at the parish aforesaid, in the ward aforesaid, in London aforesaid, had notice thereof, and was then and there duly required to appear, among others, in the court holden before the mayor and aldermen of the said city, in the Guildhall of the said city of London, on the Monday next after the Feast of the Epiphany then next following, to make due presentment of all offences in that behalf presentable within the ward aforesaid, for the public good, nevertheless the said W. H., little regarding his duty in this behalf, but intending and endeavouring the due execution of his said office last-mentioned totally to neglect and omit, on the said 21st day of December, in the year aforesaid, and continually after his said election to the said office, until the day of the taking of this inquisition (although often requested), and also on the said Monday next after the Feast of the Epiphany at London aforesaid (that is to say), in the parish aforesaid, in the ward aforesaid, in London aforesaid, to make his ap-

pearance as aforesaid, or to make any such presentment as aforesaid, or his said office in any manner to execute, unlawfully, knowingly, voluntarily, obstinately and contemptuously, hath altogether refused and denied, and yet doth refuse and deny against his said duty, in manifest contempt of our said Lady the Queen and her laws, to the bad example of all other persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

*Fourth Count.*—And the jurors aforesaid upon their oath aforesaid further present, that the said W. H., on the said 21st day of December, in the year aforesaid, and long before and always afterwards, until the day of exhibiting this inquisition, was inhabiting and resident in the parish of Saint Botolph, without Aldersgate aforesaid, in London aforesaid, and that the said W. H., on the said 21st day of December, in the year aforesaid, in the Court of Wardmote, there holden for the said ward, within the same ward (to wit), in the parish of Saint Botolph without Aldersgate, in the said ward of Aldersgate, in London aforesaid, was lawfully and in due manner elected into the office of one of the wardmote inquest for the aforesaid ward, for one whole year then next following, for inquiring of and presenting for the public good several offences committed within the said ward, whereof the said W. H. afterward (to wit), on the said 21st day of December, in the year aforesaid, and often afterward, at the parish aforesaid, in the ward aforesaid, in London aforesaid, had notice ; nevertheless, the said W. H., not regarding his duty in that behalf, but contriving and intending as much as in him lay altogether to omit and put off the due execution of his said office, on the said 21st day of December, in the year aforesaid, and continually afterwards, until the day of the taking of this inquisition at London aforesaid (to wit), at the parish aforesaid, in the ward aforesaid, in London aforesaid, the said office of one of the wardmote inquest aforesaid, unlawfully, knowingly, obstinately, wilfully and contemptuously, did altogether neglect and refuse, and hath neglected and refused, and yet doth entirely neglect and refuse to take upon himself and execute, against his duty, to the bad example of all other persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

*Precedents.*

No. XI.

Indictment for refusing to execute the office of one of the wardmote inquest.

Fourth count.

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No. XII.

*Indictment against a defendant for obtaining money by falsely pretending that he had then purchased certain property, which it was necessary he should immediately pay for.*

CENTRAL Criminal Court, } The jurors for our Lady the Queen  
to wit. } upon their oath present, that W. I.,  
late of the parish of Christchurch, Newgate Street, in the City of  
London, labourer, on the 9th day of March, in the 13th year of the reign  
of our Sovereign Lady Victoria, and in the year of our Lord, 1850, at  
the parish aforesaid, in the city aforesaid, and within the jurisdiction of

*Precedents.*

No. XII.  
Indictment for  
obtaining money  
under false  
pretences.

the said court, did unlawfully, fraudulently, knowingly and designedly, falsely pretend to one S. N., that he the said W. I. then had, at a certain place then called and known by the name of Dixon's Lairs, to wit, at Dixon's Lairs at Islington, in the county of Middlesex, and within the jurisdiction of the said court, 108 sheep, which he the said W. I. had then purchased, and for which said 108 sheep, he the said W. I. had then and there to pay, on the said 9th day of March, to wit, on the day and year aforesaid, and within the jurisdiction aforesaid, by means of which said false pretences he the said W. I. did then and there, and within the jurisdiction aforesaid, unlawfully, knowingly and designedly, fraudulently obtain of and from the said S. N., of the goods, chattels, moneys and valuable securities of the said S. N., ten pieces of the current gold coin of this realm, called sovereigns, one valuable security, to wit, an order for the payment of, and of the value of 18*l.*, one other valuable security, to wit, one other order for the payment of, and of the value of 51*l.* 10*s.*, one other valuable security, to wit, one other order for the payment of money, to wit, one other order for the payment of, and of the value of 45*l.* 16*s.*, one other valuable security, to wit, one other order for the payment of money, to wit, one other order for the payment of, and of the value of 36*l.*, and one other valuable security, to wit, one other order for the payment of money, to wit, one other order for the payment of, and of the value of 45*l.* 14*s.*, with intent then and there, and within the jurisdiction aforesaid, to cheat and defraud him, the said S. N., of the same goods, chattels, moneys, valuable securities and orders for the payment of money respectively, the said sums of money payable and secured by and upon the said valuable securities and orders for the payment of money, being then and there due and unsatisfied to the said S. N., the proprietor and owner of the said several valuable securities and orders for the payment of money respectively, whereas in truth and in fact the said W. I. had not, at the time when he, the said W. I., so obtained the said moneys, and the said several valuable securities and orders for the payment of money from the said S. N. as aforesaid, and when he the said W. I. made the said false pretences as aforesaid, 108 sheep at Dixon's Lairs at Islington, and whereas, in truth and in fact the said W. I. had not then purchased the said 108 sheep, and whereas, in truth and in fact, the said W. I. had not then to pay for the said 108 sheep, to wit, on the said 9th day of March, all of which said false pretences he, the said W. I., at the time of the making thereof, well knew to be false, to the great damage, injury, and deception of the said S. N., and in fraud of him the said S. N., to the evil example of all others in like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Second count.

*Second Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said S. N. heretofore, to wit, on the day and year aforesaid, and within the jurisdiction aforesaid, was accustomed to and from time to time and at various times did, at the request of the said W. I., advance and intrust divers sums of moneys to the said W. I. for the purpose of, and to enable him the said W. I. to pay for sheep after he the said W. I. had, in the way of his trade, purchased the same; and the jurors aforesaid, on their oath aforesaid, do further present that the said W. I. heretofore, to wit, on the said 9th day of March, in the year aforesaid, in the city aforesaid, and within the jurisdiction of he said court, well knowing the premises, did unlawfully, fraudulently, know-

ingly and designedly, falsely pretend to the said S. N. that he the said W. I. had theretofore, and before the making the false pretences by him the said W. I., hereinafter in this count mentioned, purchased for himself a certain number of sheep, of a certain value, to wit, of the value of 51*l.* 10*s.*, for which he the said W. I. had to pay at the bank of Messrs. Pocklington & Co., on the day and year last aforesaid, a certain sum of money, to wit, the sum of 51*l.* 10*s.*, by means of which last-mentioned false pretences in this count mentioned, he the said W. I. did then and there, and within the jurisdiction aforesaid, unlawfully, knowingly and designedly, fraudulently obtain of and from the said S. N. of the goods and chattels, moneys and valuable securities of the said S. N., one valuable security, to wit, one order for the payment of money, to wit, one order for the payment, and of the value of 51*l.* 10*s.*, with intent then and there, at the time of the making of the said false pretences by him the said W. I., in this count mentioned, and within the jurisdiction of the said court, to cheat and defraud him the said S. N. of the said valuable security and order for payment of money in this count mentioned, the said sums of money in this count payable, and secured by and upon the said valuable security and order for the payment of money in this count mentioned, being then and there, to wit, at the time of the making of the said last-mentioned false pretences due and unsatisfied, to the said S. N., the proprietor and owner of the same, whereas, in truth and in fact, the said W. I. had not theretofore, and before the making of the said false pretences by him the said W. I., in this count mentioned, purchased for himself a certain number of sheep, of the value of 51*l.* 10*s.*, for which he the said W. I. had to pay, at the bank of Messrs. Pocklington & Co., on the day and year last aforesaid, and in this count mentioned, the said sum of 51*l.* 10*s.*, which said last-mentioned false pretences he the said W. I., at the time of the making thereof, well knew to be false, to the great damage, injury and deception of the said S. N., and in fraud of him the said S. N., to the evil example of all others in the like case offending, against the statute in that case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

*Precedents.*

No. XIII.

Indictment for  
obtaining money  
under false  
pretences.

### No. XIII.

*Indictment for a conspiracy to obtain possession of goods by false pretences.*

CENTRAL Criminal Court, } The jurors for our Lady the Queen,  
to wit. } upon their oath present, that Joseph Strickland, late of the parish of Paddington, in the county of Middlesex, labourer; Frances Mac Kenna, late of the same place, married wman; and Ann Collins, late of the same place, married woman, being evil disposed persons, and intending and contriving to injure and defraud one William Savage, heretofore, to wit, on the 2nd day of September, A.D., 1850, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the Central Criminal Court, unlawfully, knowingly, and fraudulently did conspire, combine, confederate and

*Precedents.*

No. XIII.  
Indictment for  
a conspiracy to  
obtain goods by  
false pretences.

agree together that the said F. M'K. should falsely pretend to one Ellen the wife of the said W. S., that she the said F. M'K. had been authorized and requested by one ——— Holmes, whose christian name is to the said jurors unknown, to order of and from the said E. divers goods and chattels of the goods and chattels of the said W. S., to wit, one silk dress of the value of 5*l.*, one silk mantle of the value of 5*l.*, and one velvet paletot of the value of 5*l.*, for and on behalf of the said — H., and that the said F. M'K. should fraudulently order the said goods and chattels of and from the said E. for and in the name of the said — H., and directing the said goods and chattels to be sent and delivered to the said — H. at the house of the said A. C., situate and being No. 22, Upper Gloucester Place, Dorset Square, and that the said F. M'K. should falsely pretend to the said E. that the said goods and chattels were ordered and intended for the said — H., and that the said A. C. should induce and procure the person by whom the said goods and chattels should be brought to the said house for the said — H., to leave the same without taking payment for the same, by falsely pretending to the said person by whom the said goods and chattels should be so brought, that the said — H. was at the time when the said goods and chattels should be so brought as aforesaid residing in the said house but was not at home, and thereby and by means of the said several premises in this count mentioned to obtain of and from the said W. S. the said goods and chattels, the property of the said W. S., without paying for the same, and to cheat and defraud him thereof, to the great damage of the said W. S., and against the peace of our Lady the Queen, her crown and dignity.

Second count.

*Second Count.*—That the said J. S., F. M'K., and the said A. C., being evil disposed persons, and wickedly intending to injure and aggrieve the said W. S., on the day aforesaid, in the year aforesaid, with force and arms at the parish aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, unlawfully and fraudulently did again conspire, combine, confederate and agree together, by falsely and fraudulently pretending to the said E., that the said F. M'K. had been authorized and desired by one Mistress Holmes, whose name is to the jurors not further or otherwise known, to order of and from the said E. divers goods and chattels of the goods and chattels of the said W. S., to wit, one silk dress of the value of 5*l.*, one silk mantle of the value of 5*l.*, and one velvet paletot of the value of 5*l.*, for and on the behalf of the said Mistress H., and by fraudulently ordering the said last-mentioned goods and chattels of and from the said E., for and in the name of the said Mistress H., and directing the same to be sent and delivered to the said Mistress H., at the said house of the said A. C., and by falsely pretending that the said last-mentioned goods and chattels were ordered and intended for the said Mistress H., to obtain of and from the said W. S. the said last-mentioned goods and chattels the property of the said W. S., and to cheat and defraud the said W. S. thereof; to the great damage of the said W. S., and against the peace of our Lady the Queen, her crown and dignity.

Third count.

*Third Count.*—That the said J. S., the said F. M'K., and the said A. C., being evil disposed persons, and wickedly intending and contriving to injure and defraud the said W. S., heretofore, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did again unlawfully, wilfully, knowingly, and fraudulently conspire.

combine, confederate, and agree together by divers false pretences and subtle means and devices, to obtain of and from the said W. S. divers goods and chattels of the goods and chattels of the said W. S., to wit, one silk dress of the value of 5*l.*, one silk mantle of the value of 5*l.*, and one velvet paletot of the value of 5*l.*, and to cheat and defraud him of the same, to the great damage of the said W. S., and against the peace of our Lady the Queen, her crown and dignity.

*Precedents.*

No. XIII.

Indictment for  
a conspiracy to  
obtain goods by  
false pretences.

*Fourth Count.*—That the said J. S., the said F. M'K., and the said A. C., wickedly contriving and intending to injure and defraud the said W. S. did, on the day aforesaid, in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, again unlawfully, wilfully and fraudulently conspire, combine, confederate and agree together, fraudulently and deceitfully to order of and from the said E. divers goods and chattels, of the goods and chattels of the said W. S., of great value, to wit, of the value of 15*l.*, for and in the name of the said Mrs. — H., whose name is to the said jurors not further or otherwise known, and to direct that the said last-mentioned goods and chattels should be sent to the said Mrs. — H., at the said house of the said A. C., situate and being No. 22, Upper Gloucester-place, Dorset-square, and fraudulently and wilfully to induce and procure the persons who might bring the said last-mentioned goods and chattels to the said house, to leave the said last-mentioned goods and chattels at the said house for the said Mrs. — H., without receiving payment for the same, and to obtain and retain possession of the said last-mentioned goods and chattels without paying for the same, and to transfer the said last-mentioned goods and chattels, when so left at the said house of the said A. C., for the said Mrs. — H., into the custody and possession of the said J. S., in order and to the intent that the said J. S. should retain the custody and possession of the same, without any payment having been made for the said last-mentioned goods and chattels, with intent to defraud the said W. S. of the said last-mentioned goods and chattels, to the great damage of the said W. S., and against the peace of our Lady the Queen, her crown and dignity.

Fourth count.

*Fifth Count.*—That the said J. S., the said M'K., and the said A. C., being evil-disposed persons, and wickedly intending and contriving to injure and defraud the said E., the wife of the said W. S., heretofore, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did again unlawfully, knowingly, and fraudulently conspire, combine, confederate, and agree together, by divers false pretences and subtle means and devices, to obtain of and from the said E. divers goods and chattels, of the goods and chattels of the said E., to wit, one silk dress of the value of 5*l.*, one silk mantle of the value of 5*l.*, and one velvet paletot of the value of 5*l.*, and to cheat and defraud her of the same, to the great damage of the said E., and against the peace of our Lady the Queen, her crown and dignity.

Fifth count.



## No. XIII.

*Indictment for a Conspiracy to defraud a Railway Company by travelling without a Ticket on some portion of the line—obtaining a Ticket at an intermediate Station, and then delivering it up at the Terminus as if no greater distance had been travelled over by the Passenger than from such intermediate Station to the Terminus.*

THAT heretofore and before and at the time of the committing of the offence hereinafter next mentioned, the London and North Western Railway Company used, worked and employed a certain railway called the London and North Western Railway, for the purpose of conveying passengers and goods thereon for hire, part of which said railway runs from a certain railway station at Birmingham, in the county of Warwick, to a certain other railway station called the Willesden station, to wit, at Willesden, in the county of Middlesex, thence to a certain other railway station, called the Camden station, to wit, at the parish of St. Pancras, in the said county of Middlesex, and thence to a certain other railway station called the Euston station, to wit, at the parish last aforesaid, in the county last aforesaid. That at the time of the committing of the offence hereinafter next mentioned, the said company were lawfully entitled to have, demand and receive of and from every person conveyed by the said company as a third-class passenger over that part of the said railway which runs from the said station at Birmingham to the said Willesden station, the sum of 8s. 10½d., and of and from every person conveyed as a third-class passenger over that part of the said railway which runs from the said Willesden station to the said Euston station, and no further or greater distance, the sum of sixpence. That before and at the time of the committing of the offence hereinafter next mentioned, the said company, upon payment of the proper charges in that behalf, had been and were in the habit of granting to persons requiring to be conveyed by the said company, as passengers upon the said railway, certain tickets denoting the railway stations from and to which such persons respectively might require to be conveyed, which said tickets, when delivered up to the said company at the said stations, denoted thereupon as the station to which such persons required to be conveyed, or at any other station between such last mentioned stations and the station from which such persons respectively required to be conveyed, were vouchers in favour of such persons delivering the same, and denoted and were accepted and received by the said company, in the absence of notice to the said company, as vouchers denoting that such persons had paid and discharged all the proper charges due to the said company in respect of their conveyance as passengers upon the said railway. That heretofore and before, and at the time of the committing of the offence hereinafter next mentioned, to wit, on the fourth day of January, in the year of our Lord, 1851, one William Williams, at his own request and instance, had been conveyed by the said company as a third-class passenger over that part of the said railway which runs from the said station at Birmingham to the said Willesden station, whereupon the said William Williams then and there became and was justly and truly indebted to the said com-

pany in the said sum of 8*s.* 10½*d.*, and which said sum of 8*s.* 10½*d.*, the said company were then and there lawfully entitled to have, demand and receive of and from the said William Williams for and in respect of such his conveyance as aforesaid.

That the said William Williams, late of the parish of Willesden, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, labourer, and William Brown, late of the same place, labourer, and divers other evil-disposed persons, whose names to the jurors aforesaid are as yet unknown, wickedly devising and intending to cheat, deceive, injure and defraud the said company in the premises, afterwards, to wit, on the day and year aforesaid, and whilst the said William Williams was so justly and truly indebted to the said company as aforesaid, and whilst the said company were so entitled to have, demand and receive of and from the said William Williams the said sum of 8*s.* 10½*d.*, as aforesaid, in the parish of Willesden aforesaid, in the county of Middlesex, aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully and wickedly did conspire, combine, confederate and agree together to purchase and procure of the said company, at the said Willesden station, for the sum of sixpence, one of the said tickets, so granted by them as aforesaid, denoting that the person to whom such ticket had been granted had required to be conveyed from the said Willesden station to the said Euston station, and no further or greater distance, upon the said railway, and that all the proper moneys due to the said company in respect of such last mentioned conveyance had been paid and discharged, and afterwards that the said William Williams and William Brown should travel together on the said railway from the said Willesden station to the Camden station, and thence to the said Euston station, the said Camden station being a railway station between the said Willesden station and the said Euston station, and should at the said Camden station fraudulently and deceitfully produce such ticket to the said company and their servants as a ticket granted to the said William Williams at the commencement of his journey upon the said railway, and as a voucher that the said William Williams had paid and discharged all the proper charges due to the said company in respect of the conveyance of him the said William Williams upon the said railway, and as well by means of the said ticket as by divers false pretences, unlawfully, deceitfully, and fraudulently to cause it falsely to appear to the said company that the said William Williams had not been conveyed as a passenger any greater or other distance upon the said railway than from the Willesden station aforesaid to the said Camden station; and that the said William Williams had paid to the said company all the proper charges for his conveyance as a passenger upon the said railway, and fraudulently and deceitfully to induce and persuade the said company and their said servants to accept and receive the said ticket in satisfaction and discharge of all and every the charges to which the said William Williams was then and there liable in respect of such his conveyance as aforesaid, and as a voucher to the effect that such charges had been fully paid and satisfied to the said company by the said William Williams, and in manner aforesaid to deceive, injure and prejudice the said company, and to defraud the said company of the said sum of 8*s.* 10½*d.*, in which the said William Williams was so indebted as aforesaid, and mutually to aid and assist one another in perfecting and putting in execution the said unlawful and wicked conspiracy, combination, confederation and agreement.

*Precedents.*

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No. XIII.

Indictment for  
conspiracy to  
defraud railway  
company.

*Precedents.*

No. XIII.  
Indictment for  
conspiracy to  
defraud railway  
company.

That the said William Williams and William Brown in fraudulent collusion with the said other evil-disposed persons, in prosecution and pursuance of the said wicked and unlawful combination, conspiracy, confederacy and agreement did, on the fourth day of January, in the year of our Lord 1851, and whilst the said William Williams was indebted as aforesaid, purchase and procure of the said company, at the said Willesden station, for the sum of sixpence, a certain ticket, denoting that the person to whom such ticket had been granted had required to be conveyed from the said Willesden station to the said Euston station, and no further or greater distance, on the said railway, and had paid all the proper charges for such conveyances, and afterwards did travel again on the said railway to the said Camden station, being a railway station between the said Willesden station and the said Euston station, and there at the said Camden station did produce and deliver the said ticket to one William Ludlow Penson, then and there being a servant of the said company, as a ticket granted to the said William Williams at the commencement of his journey as a passenger on the said railway, and unlawfully, fraudulently, deceitfully and injuriously offer the said ticket to the said William Ludlow Penson as a voucher to the effect that all the charges lawfully to be made by the said company upon him the said William Williams, in respect of his conveyance upon the said railway had been paid and discharged by the said William Williams, and did thereby endeavour to cheat and defraud the said company of the said sum of 8s. 10½d., so due to them from the said William Williams for such conveyance of the said William Williams to the said Willesden station, as aforesaid, to the great injury and deception of the said company, in contempt, &c., to the evil, &c., and against the peace, &c.

Fifth count.

*Fifth Count.*—That heretofore and before and at the time of the committing of the offence hereinafter next mentioned, the said William Williams was justly and truly indebted to the said London and North Western Railway Company in the sum of 8s. 10½d., for the conveyance of the said William Williams as a passenger on a certain part of the said London and North Western Railway Company, that is to say, from Birmingham in the county of Warwick to Willesden in the said county of Middlesex.

That the said William Williams and William Brown, afterwards, to wit, on the day and year aforesaid, being possessed of a certain ticket of no value to the said company, granted by the said company, and denoting that the person having possession thereof was entitled to be conveyed by the said company on a certain other part of the said railway, that is to say, from Willesden aforesaid to the said railway station called the Camden station, and thence to the said station called the Euston station, free of all charge for and in respect of such conveyance; afterwards, to wit, on the day and year aforesaid, and whilst the said William Williams was so justly and truly indebted as last aforesaid, at the parish of St. Pancras aforesaid, in the county of Middlesex aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully and wickedly did conspire, combine, confederate, and agree together, and with divers other evil-disposed persons, whose names to the jurors aforesaid are as yet unknown, unlawfully, knowingly, fraudulently, and deceitfully falsely to pretend and to cause it falsely to appear to the said company and their servants, that the said William Williams had been conveyed by the said company no further or other distance on the said railway than from Willesden aforesaid to the

said station called the Camden station, and that the said William Williams was not indebted to the said railway company, or liable to pay them any sum of money for his conveyance upon the said railway, and by the false pretences and appearances, in this count aforesaid, to induce and persuade the said company and their said servants to accept and receive the said ticket in this count mentioned, as a voucher to the effect that all claims, charges and demands of the said company on the said William Williams, in respect of such conveyance as a passenger on the said railway, had been fully paid and discharged, and for and in full satisfaction of all claims, charges and demands whatsoever of the said company upon the said William Williams, for his conveyance as a passenger on the said railway, and thereby unlawfully, wrongfully, unjustly and fraudulently to enable the said William Williams to avoid, escape, evade and elude, and with intent and in order that the said William Williams should thereby unlawfully, wrongfully, injuriously and fraudulently avoid, escape, evade and elude the payment of the said sum of 8s. 10½d., so due to the said company as in this count aforesaid, and to hurt, injure, deceive, prejudice and defraud the said company in manner in this count mentioned, to the great injury, &c., against the peace, &c.

*Precedents.*  
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No. XIII.  
Indictment for  
conspiring to  
defraud railway  
company.

*Ninth Count.*—That heretofore, and before and at the time of the committing of the offence hereinafter next mentioned, he the said William Williams, was indebted to the said London and North Western Railway Company in a certain sum of money, to wit, the sum of 8s. 10½d., and that he the said William Williams, and William Brown, being evil-disposed persons, afterwards, to wit, on the day and year aforesaid, at the parish of Willesden aforesaid, in the county of Middlesex aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully and wickedly did conspire, combine, confederate and agree together, and with divers other evil-disposed persons, whose names to the jurors aforesaid are as yet unknown, by divers false pretences, and by divers crafty, indirect, false, fraudulent and deceitful acts, ways, means, devices, stratagems and contrivances, to enable the said William Williams to avoid, escape, evade, elude and withhold the payment of the said sum of 8s. 10½d. to the said company, and to cheat, defraud, and altogether deprive the said company of the said debt in this count mentioned, and of all profit, benefit and advantage to the said company, arising and to arise from the same, to the great injury and deception of the said company, in contempt of our said Lady the Queen and her laws, to the evil and pernicious example, &c., and against the peace, &c.

#### No. XIV.

*Indictment against two Defendants for obtaining Money under false pretences, the false pretences being that one of the Defendants having advanced Money to the other on a deposit of certain Title Deeds, had himself deposited the Deeds with a friend, and that he required a sum of Money to redeem them; with counts for conspiracy.*

CENTRAL Criminal Court, } The jurors for our Lady the Queen,  
to wit. } upon their oath present, that here-

*Precedents.*

No. XIV.  
Indictment for  
obtaining money  
under false  
pretences.

tofore and before, and at the time of the committing of the offence hereinafter mentioned, one C. R., acting in fraudulent collusion with one J. A., had retained and employed one W. I., then and still practising as an attorney at law and solicitor in chancery, as the attorney and solicitor of the said C. R., to make application to the said J. A. for a certain debt of 68*l.* then alleged by the said C. R. to be due to him from the said J. A. And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. A., afterwards and before the committing of the offence hereinafter mentioned, acting in fraudulent collusion with the said C. R., offered to and arranged with the said W. I., as such attorney and solicitor of the said C. R., as aforesaid, to discharge such alleged debt of 68*l.*, and also the further sum of 6*l.* 5*s.*, for a certain other alleged debt upon the deeds hereinafter mentioned being delivered to him the said J. A., which said deeds the said C. R., acting in fraudulent collusion with the said J. A., afterwards and before the committing of the offence hereinafter mentioned, proposed to place in the hands of the said W. I., as the attorney and solicitor of the said C. R., for the purpose of being so delivered to the said J. A. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. R., late of the parish of Saint George, Bloomsbury, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, labourer, and the said J. A., late of the same place, labourer, being evil-disposed persons, and devising and contriving, and wickedly combining and intending to deceive the said W. I. in the premises, and to obtain from the said W. I. the said sum of 68*l.*, and to cheat and defraud him of the same ; afterwards, to wit, on the 20th day of November, A.D. 1850, at the parish of Saint George, Bloomsbury aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly, and designedly did falsely pretend to the said W. I. that he the said J. A. was then really and truly indebted to the said C. R. in the said sum of 68*l.*, for money lent by the said C. R. to the said J. A.; that he the said J. A. had then deposited with the said C. R. certain deeds relating to the property of the wife of the said J. A., for the purpose of securing payment of the said sum of 68*l.* to the said C. R., but that the said C. R. afterwards had deposited such deeds with a friend of the said C. R., who had then advanced money upon the security of the same deeds to the said C. R., and then held the said deeds as such security as last aforesaid; that he the said C. R., then wanted the said sum of 68*l.* from the said W. I. for the purpose of recovering possession of the said deeds, and to enable him the said C. R. to place the same in the hands of the said W. I., in order that the same might be redelivered to the said J. A. upon the payment by him to the said W. I. of the said sum of 68*l.* pursuant to such offer and arrangement in that behalf as aforesaid ; by means of which said several false pretences, they the said C. R. and J. A. then and there, to wit, on the day and year aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly and designedly did fraudulently obtain of and from the said W. I. one order for the payment of money, to wit, for the payment, and of the value of 68*l.*, then and there being the property of the said W. I., and one piece of paper of the value of 1*d.* of the goods and chattels of the said W. I., with intent to cheat and defraud him of the same property, good and chattels, and whereas in truth and in fact, the said J. A. was not then really and truly indebted to the said C. R. in the said sum of 68*l.* as the said C. R. and J. A. so falsely pretended as aforesaid, either

for money lent or any cause whatsoever. And whereas in truth and in fact the said J. A. had not then deposited with the said C. R. certain deeds relating to the property of the wife of the said J. A. for the purpose of securing payment of the said sum of 68*l.* to the said C. R., as the said C. R. and J. A. so falsely pretended as aforesaid, or of any sum of money whatever. And whereas in truth and in fact the said C. R. had not then deposited any such deeds as the said C. R. and J. A. so falsely pretended as aforesaid with any friend of the said C. R. who had then advanced money upon the security of such deeds to the said C. R., or with any person whatsoever ; nor did any such friend of the said C. R., as the said C. R. and J. A. so falsely pretended as aforesaid, then hold such deed as a security for any money advanced to the said C. R., as the said C. R. and J. A. so falsely pretended as aforesaid. And whereas in truth and in fact the said C. R. did not then want the said sum of 68*l.* from the said W. I., for the purpose of recovering possession of any such deeds as the said C. R. and J. A. so falsely pretended as aforesaid, or to enable him the said C. R. to place such deeds in the hands of the said W. I., in order that the same might be re-delivered to the said J. A., upon the payment by him to the said W. I. of the said sum of 68*l.*, pursuant to such offer and arrangement in that behalf as aforesaid. And whereas in truth and in fact the said alleged debt, and the said supposed deeds, had no existence whatsoever, but were pretended to have existence by the said C. R. and J. A. as aforesaid, for the purpose of deceiving, cheating and defrauding the said W. I. in manner aforesaid, and for no other purpose whatever, to the great injury and deception of the said W. I., to the evil and pernicious example of all other persons in the like case offending, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Second Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. R. and J. A., being evil-disposed persons, and devising and contriving, and wickedly combining and intending to deceive the said W. I., and to obtain from the said W. I. the said sum of 68*l.*, and to cheat and defraud him of the same, afterwards, to wit, on the 20th day of November, A. D. 1850, at the parish of St. George, Bloomsbury aforesaid, in the county of Middlesex aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, knowingly and designedly, did falsely pretend to the said W. I., that the said J. A. had before then deposited with the said C. R., certain deeds relating to the property of the wife of the said J. A., as a security for the payment to the said C. R. of the sum of 68*l.* ; that he the said C. R. had afterwards deposited such deeds with a friend of the said C. R., who had then advanced money to the said C. R., upon the security of the said deeds, and then held such deeds as such security as last aforesaid. And that the said C. R. then required the sum of 68*l.* for the purpose of recovering possession of the said deeds, by means of which said several false pretences in this count mentioned, they the said C. R. and J. A. did then and there unlawfully, knowingly and designedly, fraudulently obtain of and from the said W. I. one order for the payment of money, to wit, for the payment of the sum of 68*l.*, then and there being of the value of 68*l.*, and the property of the said W. I. ; and one piece of paper of the value of 1*d.*, of the goods and chattels of the said W. I., with intent to cheat and defraud the said W. I. of the said goods and chattels and property ; whereas in truth and in fact the said J. A.

*Precedents.*

—  
No. XIV.  
Indictment for  
obtaining money  
under false  
pretences.

*Precedents.*

No. XIV.  
Indictment for  
obtaining money  
under false  
pretences.

had not deposited with the said C. R. such deeds relating to the property of the wife of the said J. A., as the said C. R. and J. A. so falsely pretended, as in this count mentioned. And whereas in truth and in fact the said C. R. had not deposited such deeds with any friend of him the said C. R., as the said C. R. and J. A. so falsely pretended, as in this count mentioned. And whereas in truth and in fact no friend of the said C. R., nor any person whatsoever, had then advanced money to the said C. R. upon the security of the said deeds. And whereas in truth and in fact no friend of the said C. R., nor any person whatsoever, then held such deeds as any security whatsoever. And whereas in truth and in fact the said C. R. did not then require the said sum of 68*l.*, or any sum of money whatsoever, for the purpose of recovering possession of such deeds as the said C. R. and J. A. so falsely pretended, as in this count mentioned. And whereas in truth and in fact such deeds had no existence whatsoever, but were so pretended by the said C. R. and J. A. to have existence as aforesaid, for the purpose of cheating and defrauding the said W. I. as aforesaid, and for no other purpose whatsoever, to the great injury and deception of the said W. I., to the evil and pernicious example of all other persons in the like case offending, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Third Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. A. and C. R., being such evil-disposed persons as aforesaid, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully and wickedly did conspire, combine, confederate and agree together, and with divers other evil-disposed persons, whose names to the jurors aforesaid are as yet unknown, falsely and fraudulently to pretend and cause to appear to the said W. I., that the said J. A. was then indebted to the said C. R. in the sum of 68*l.*; that the said J. A. had deposited with the said C. R. certain deeds relating to the property of the wife of the said J. A., as a security for the payment to the said C. R. of the said sum of 68*l.*; that the said C. R. had afterwards deposited such deeds with a friend of the said C. R., who had advanced money upon the security of the same, and by whom such deeds were then held; that the said J. A. was desirous of discharging the said debt due from him to the said C. R., upon the re-delivery to him the said J. A., of the said deeds, but that the said C. R. was then unable to procure the re-delivery to him of the said deeds, for want of money to pay such money so advanced to him upon the security of the same, and to induce and persuade the said W. I., by means of the several false representations aforesaid, and upon the faith and confidence that such deeds really existed, and upon the promise and assurance of the said C. R. that he would deposit the said deeds with the said W. J., for the purpose of delivering the same to the said J. A., and receiving from the said J. A. such debt of 68*l.*, so to be pretended to be due from the said J. A. to the said C. R., to obtain from the said W. I. divers of the moneys of the said W. I., amounting to the sum of 68*l.*, for the pretended purpose of obtaining such deeds from such friend of the said C. R., and to cheat and defraud the said W. I. of the same, and mutually to aid and assist one another in carrying out and putting into execution the said unlawful and wicked combination, conspiracy, confederation and agreement; whereas in truth and in fact no such deeds as

in this count mentioned, then or ever had any existence whatsoever, to the great injury and deception of the said W. J., to the evil and pernicious example of all other persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

*Fourth Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. A. and C. R., being such evil-disposed persons as aforesaid, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully and wickedly did conspire, combine, confederate and agree together, and with divers other evil-disposed persons, whose names to the jurors aforesaid are as yet unknown, by divers false pretences, and by divers false, artful, indirect, deceitful and fraudulent means, devices, arts, stratagems, and contrivances to obtain and acquire into their hands and possession, of and from the said W. J. divers of his moneys, amounting to a large sum, to wit, the sum of 68*l.*, and to cheat and defraud him of the same, to the great injury and deception of the said W. J., to the evil and pernicious example of all other persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

*Precedents.*

No. XIV.  
Indictment for  
obtaining  
money under  
false pretences.

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No. XV.

*Indictment for obtaining Money, by falsely pretending that the Defendant was the authorized Agent of the Executive Committee of the Exhibition of the Works of Industry of all Nations, and that he had power to allot Space to private Individuals for the exhibition of their Merchandize.*

CENTRAL Criminal Court, } The jurors for our Lady the Queen,  
to wit. } upon their oath present, that heretofore, and before the committing of the offence hereinafter next mentioned, to wit, on the twenty-fifth day of October, in the year of our Lord one thousand eight hundred and fifty, an application was made by Harriet Richardson, then being the wife of Thomas Richardson, to one Adam Young the younger, for a certain space, to wit, a space of four feet square, in a certain building then in the course of erection in Hyde-park, in the county of Middlesex, for the purpose of an Exhibition intended to take place in the year of our Lord one thousand eight hundred and fifty-one, and called and known as the Great Exhibition of the Works of Industry of all Nations, for the purpose of enabling her, the said Harriet Richardson, to exhibit certain articles, to wit, stays, at the said exhibition. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Adam Young the younger, late of the parish of Saint Dunstan in the East, in the city of London, labourer, afterwards, to wit, on the day aforesaid, in the year aforesaid, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the



*Precedents.*  
 —  
 No. XV.  
 Indictment for  
 obtaining  
 money under  
 false pretences.

Central Criminal Court, unlawfully, knowingly and designedly, did falsely pretend to the said Harriet Richardson, that he the said Adam Young the younger, then was an authorized agent for the purpose of granting space for the exhibition of articles at the said Exhibition. And that he, the said Adam Young the younger, then was the only person who had the power to grant space to the said Harriet Richardson, for the exhibition of articles at the said Exhibition. And that he, the said Adam Young the younger, then had power to grant to the said Harriet Richardson the said space so applied for by the said Harriet Richardson as aforesaid, by means of which said false pretences the said Adam Young the younger did then and there unlawfully obtain from the said Harriet Richardson three pieces of the current silver coin of this realm, called half-crowns, two pieces of the current silver coin of the realm called shillings, and one piece of the current silver coin of this realm called a sixpence, of the moneys of the said Thomas Richardson, with intent then and there to cheat and defraud the said Thomas Richardson of the same; whereas, in truth and in fact, the said Adam Young the younger was not then an authorized agent for the purpose of granting, and had not any authority whatever to grant space for the exhibition of articles at the said Exhibition, or any space whatever in the said building, as he, the said Adam Young the younger then and there well knew. And whereas, in truth and in fact, the said Adam Young the younger was not then the only person who had power to grant space for the exhibition of articles at the said Exhibition, as he, the said Adam Young the younger then and there well knew. And whereas, in truth and in fact, the said Adam Young the younger had not then any power, authority or right whatever to grant space for the exhibition of articles at the said Exhibition to the said Harriet Richardson, or to any other person whatever, or any space whatever in the said building to the said Harriet Richardson, or any other person, as he the said Adam Young the younger then and there well knew, to the great damage of the said Thomas Richardson, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

*Second Count.*

*Second Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that heretofore, and before the committing of the offence hereinafter next mentioned, to wit, on the day aforesaid, in the year of our Lord one thousand eight hundred and fifty, an application was made by the said Harriet, the wife of the said Thomas Richardson, to the said Adam Young the younger, for a certain space, to wit, a space of four feet square, at the Great Exhibition, meaning thereby a space of four feet square in a certain building, intended to be used as the building in which a certain exhibition, called and known as the Great Exhibition of the Works of Industry of all Nations, should take place, in the year of our Lord one thousand eight hundred and fifty-one, for the exhibition of certain articles, to wit, stays, at the said Exhibition. And the jurors aforesaid do further present, that the said Adam Young the younger afterwards, to wit, on the day aforesaid, in the year of our Lord one thousand eight hundred and fifty, at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the Central Criminal Court, unlawfully, knowingly and designedly, did again falsely pretend to the said Harriet Richardson, that he, the said Adam Young the younger then had power to grant to the said Harriet Richardson space for the exhibition of articles at the said Exhibition. And that he, the

said Adam Young the younger, then had power to grant to the said Harriet Richardson, the said space so applied for by the said Harriet Richardson, as aforesaid, by means of which said last-mentioned false pretences the said Adam Young the younger did then and there unlawfully obtain from the said Harriet Richardson three other pieces of the current silver coin of this realm called half-crowns, two other pieces of the current silver coin of this realm called shillings, and one other piece of the current silver coin of this realm called a sixpence, of the monies of the said Thomas Richardson, with intent, then and there, to cheat and defraud the said Thomas Richardson of the same, whereas, in truth and in fact, the said Adam Young the younger had not then any power or right whatsoever to grant space for the exhibition of articles at the said Exhibition, to the said Harriet Richardson, or to any other person whatever, or any space whatever in the said building, to the said Harriet Richardson or any other person, as he the said Adam Young the younger then and there as last aforesaid well knew, to the great damage of the said Thomas Richardson, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Precedents.*  
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No. XV.  
Indictment for  
obtaining  
money under  
false pretences.

*Third Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that before the committing of the offence hereinafter next mentioned, to wit, on the day aforesaid, in the year of our Lord one thousand eight hundred and fifty, an application was made by the said Thomas Richardson to the said Adam Young the younger for a certain space, to wit, space of four feet square in the building intended for the proposed Great Exhibition of one thousand eight hundred and fifty-one, meaning thereby the Great Exhibition of the Works of Industry of all Nations, intended to be holden in the year one thousand eight hundred and fifty-one. And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, and before the making of the said last-mentioned application, an Executive Committee for carrying out the said Exhibition, had been and was duly appointed for the purpose of carrying out the said Exhibition, and that, amongst other things, the power of allotting space in the said last-mentioned building to persons desirous of becoming exhibitors in the said Exhibition, had been, and was, vested and intrusted to the said committee. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Adam Young the younger, afterwards, to wit, on the day aforesaid, in the year of our Lord one thousand eight hundred and fifty, at the parish aforesaid, in the city aforesaid, and within the jurisdiction aforesaid, unlawfully, knowingly and fraudulently, did again falsely pretend to the said Thomas Richardson, that he the said Adam Young the younger was the only authorized agent of the commissioners (meaning thereby that he was the only authorized agent of the said Executive Committee) for granting space (meaning thereby space in the said last-mentioned building), and that he the said Adam Young the younger then had power to allot to the said Thomas Richardson the space in the said building, so applied for by the said Thomas Richardson as last-aforesaid, by means of which said last-mentioned false pretences, he, the said Adam Young the younger, did then and there as last aforesaid, unlawfully attempt and endeavour unlawfully to obtain from the said Thomas Richardson a large sum of money, to wit, the sum of ten shillings, of the moneys of the said Thomas Richardson, with intent then and there to cheat and defraud him thereof; whereas, in truth and in fact, the

*Precedents.*  
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No. XV.  
Indictment for  
obtaining  
money under  
false pretences.

said Adam Young the younger was not, at the time he so falsely pretended as last aforesaid, an authorized agent of the said Executive Committee, for granting space in the last-mentioned building, as he, the said Adam Young the younger then and there, as last aforesaid, well knew. And whereas, in truth and in fact, the said Adam Young the younger had not, at the time he falsely pretended as last aforesaid, any power, authority or right whatsoever, to allot any space whatever in the said last-mentioned building to the said Thomas Richardson, or to any other person, as he the said Adam Young the younger, at the time he so falsely pretended as last aforesaid, well knew, to the great damage of the said Thomas Richardson, and against the peace of our said Lady the Queen, her crown and dignity.

Fourth count.

*Fourth Count.*—And the jurors aforesaid, upon their oath aforesaid, further present, that before the committing of the offence next hereinafter mentioned, to wit, on the day aforesaid, in the year of our Lord one thousand eight hundred and fifty, an application was made by the said Thomas Richardson to the said Adam Young for a certain space, to wit, the space of four feet square, in the building intended for the proposed Great Exhibition, to be holden in the year of our Lord one thousand eight hundred and fifty-one, to wit, the proposed Great Exhibition of Works of Industry of all Nations. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Adam Young the younger, afterwards, to wit, on the day aforesaid, in the year of our Lord one thousand eight hundred and fifty, at the parish aforesaid, in the city and within the jurisdiction aforesaid, unlawfully, knowingly and fraudulently, did again falsely pretend to the said Thomas Richardson, that he the said Adam Young the younger, then, as last aforesaid, had power to allot to the said Thomas Richardson the space in the said last-mentioned building, so applied for by the said Thomas Richardson as last aforesaid, by means of which said last-mentioned false pretence the said Adam Young the younger did then and there, as last aforesaid, unlawfully attempt and endeavour unlawfully to obtain from the said Thomas Richardson a large sum of money, to wit, the sum of ten shillings, of the moneys of the said Thomas Richardson, with intent to cheat and defraud the said Thomas Richardson thereof; whereas, in truth and in fact, the said Adam Young the younger had not, at the time he so falsely pretended as last aforesaid, any power, authority, or right whatever, to allot any space whatever in the last-mentioned building, to the said Thomas Richardson or to any other person, as he the said Adam Young the younger, at the time he so falsely pretended as last aforesaid, well knew, to the great damage of the said Thomas Richardson, and against the peace of our Lady the Queen, her crown and dignity.

STATUTES AND PARTS OF STATUTES  
RELATING TO THE CRIMINAL LAW.

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ACTS OF PARLIAMENT ABBREVIATION ACT.

13 VICT. CAP. 21.

*An Act for shortening the Language used in Acts of Parliament.*—  
[10th June, 1850.]

**B**E it declared and enacted by the Queen's most excellent Majesty, by Acts of  
and with the advice and consent of the Lords spiritual and temporal, Parliament may  
and Commons, in this present Parliament assembled, and by the autho- be altered, &c.  
rity of the same, that every act to be passed after the commencement of in the same  
this act may be altered, amended, or repealed in the same session of session.  
Parliament, any law or usage to the contrary notwithstanding.

II. Be it enacted, that all acts shall be divided into sections, if there Acts of  
be more enactments than one, which sections shall be deemed to be Parliament to  
substantive enactments, without any introductory words. be divided into  
sections without  
introductory  
words.

III. Be it enacted, that in any act, when any former act is referred Where an act  
to, it shall be sufficient, if such act was made before the seventh year of is referred to,  
Henry the Seventh, to cite the year of the King's reign in which it was it shall be  
made, and where there are more statutes than one in the same year the sufficient to  
statute, and where there are more chapters than one the chapter; and cite the year  
if such act referred to was made after the fourth year of Henry the of the reign,  
Seventh, to cite the year of the reign, and where there are more statutes chapter, and  
or sessions than one in the same year the statute or the session (as the section, &c.  
case may require), and where there are more chapters or sections than  
one, the chapter, or section or chapter and section (as the case may re-  
quire), without reciting the title of such act, or the provision of such  
section, so referred to; and the reference in all cases shall be made  
according to the copies of statutes printed by the Queen's printer, or to  
the copies thereof contained in the reports of the Commissioners of  
Public Records: provided that where it is only intended to amend or  
repeal any portion only of such section, it shall be necessary still either  
to recite such portion, or to set forth the matter or thing intended to be  
amended or repealed.

IV. Be it enacted, that in all acts, words importing the masculine gender Interpretation  
shall be deemed and taken to include females, and the singular to include of certain words  
the plural, and the plural the singular, unless the contrary as to gender for future acts.  
or number is expressly provided; and the word "month" to mean  
calendar month, unless words be added showing lunar month to be  
intended; and "county" shall be held to mean also county of a town or  
of a city, unless such extended meaning is expressly excluded by words;

13 Vict. c. 21. and the word "land" shall include messuages, tenements, and hereditaments, houses and buildings, of any tenure, unless where there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure; and the words "oath," "swear," and "affidavit" shall include affirmation, declaration, affirming, and declaring, in the case of persons by law allowed to declare or affirm instead of swearing.

Acts of  
Parliament  
Abbreviation  
Act.

Repealed acts  
not to be revived  
in virtue of the  
repeal of the  
repealing act.

V. Be it enacted, that where any act repealing in whole or in part any former act is itself repealed, such last repeal shall not revive the act or provisions before repealed, unless words be added reviving such act or provisions.

Repealed pro-  
visions of any  
act to remain in  
force until the  
substituted  
provisions come  
into force.

VI. Be it enacted, that wherever any act shall be made repealing in whole or in part any former act, and substituting some provision or provisions instead of the provision or provisions repealed, such provision or provisions so repealed shall remain in force until the substituted provision or provisions shall come into operation by force of the last made act.

Acts to be  
deemed public  
acts.

VII. Be it enacted, that every act made after the commencement of this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such act.

Commencement  
of act.

VIII. Be it declared and enacted, that this act shall commence and take effect from and immediately after the commencement of the next session of Parliament.

## QUALIFICATION OF OFFICERS ACT.

13 & 14 VICT. CAP. 25.

*An Act to enable Queen's Counsel and others, not being of the Degree of the Coif, to act as Judges of Assize.*—[25th June, 1850.]

Queen's counsel  
and barristers  
having patents  
of precedence,  
although not of  
the degree of  
the coif, may  
act as judges of  
assize.

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that any person, being one of Her Majesty's counsel learned in the law, or being a barrister-at-law, having a patent of precedence, may be named in any commission for the despatch of civil or criminal business at any county or place or upon any circuit in England and Wales, or either of them, although such person be not of the degree of the coif; and any such person shall and may, under any commission in which he shall be so named, be and act as a judge or commissioner of assize, as fully to all intents and purposes as if, at the time of the issuing of such commission, and since he had been of the degree of the coif; any law, custom, or usage to the contrary notwithstanding.

## PIRATES (HEAD MONEY) REPEAL ACT.

13 &amp; 14 VICT. CAP. 26.

*An Act to repeal an Act of the Sixth Year of King George the Fourth, for encouraging the Capture or Destruction of Piratical Ships and Vessels; and to make other Provisions in lieu thereof.*—[25th June, 1850.]

AND be it enacted, that every person who shall wilfully and corruptly give false evidence in any examination or deposition had, or affidavit taken, in any proceeding under this act, shall be deemed guilty of perjury, and being thereof convicted, shall be subject and liable to all the punishments, pains, and penalties to which persons convicted of wilful and corrupt perjury are liable; and every such person may be tried for any such perjury either in the place where the offence was committed or in any colony or settlement of Her Majesty near thereto, in which there is a court of competent jurisdiction to try any such offence, or in Her Majesty's Court of Queen's Bench in England; and that in case of any prosecution for such offence in Her Majesty's said Court of Queen's Bench, the venue may be laid in the county of Middlesex.

Persons giving  
false evidence  
deemed guilty  
of perjury.

## LARCENY SUMMARY JURISDICTION ACT.

13 &amp; 14 VICT. CAP. 37.

*An Act for the further Extension of Summary Jurisdiction in Cases of Larceny.*—[29th July, 1850.]

WHEREAS by an act passed in the eleventh year of the reign of 10 & 11 Vict. Her Majesty, intituled *An Act for the more speedy Trial and Punishment of Juvenile Offenders*, it is enacted, that every person who should subsequently to the passing of that act be charged with having committed or having attempted to commit, or with having been an aider, abettor, counsellor, or procurer in the commission of any offence which then was, or thereafter should or might be by law deemed or declared to be simple larceny, or punishable as simple larceny, and whose age at the period of the commission or attempted commission of such offence should not, in the opinion of the justices before whom he or she should be brought or appear as thereafter mentioned, exceed the age of fourteen years, should, upon conviction thereof, upon his own confession, or upon proof before any two or more justices of the peace for any county,

13 & 14 Vict. c. 37. <i>Larceny Summary Jurisdiction Act.</i>	riding, division, borough, liberty, or place, in petty sessions assembled at the usual place and in open court, be punished as therein mentioned: and whereas by an act passed in the twelfth year of the reign of Her Majesty, intituled <i>An Act for the more speedy Trial and Punishment of Juvenile Offenders in Ireland</i> , it is enacted that every person who should subsequently to the passing of that act be charged with having committed or having attempted to commit, or with having been an aider, abettor, counsellor, or procurer in the commission of any offence in Ireland, which then was or thereafter should or might be by law deemed or declared to be simple larceny or punishable as simple larceny, and whose age at the period of the commission or attempted commission of such offence should not, in the opinion of the justices before whom he or she should be brought or appear as thereafter mentioned, exceed the age of fourteen years, should, upon conviction thereof upon his own confession, or upon proof before any two or more justices of the peace for any county, riding, division, borough, liberty, or place, in petty sessions assembled at the usual place and in open court, be punished as therein mentioned: and whereas the expense and delay sustained in the prosecution of persons guilty of petty thefts tend to the increase of such offences; and it is expedient that the provisions of the said acts should be extended as hereinafter provided: be it enacted therefore by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the said recited acts, and the jurisdiction thereby given, and all the provisions therein contained, shall extend and be applicable to all cases in which any person shall subsequently to the passing of this act be charged with any such offence as in the said acts mentioned, and the age of the person so charged at the period of the commission or attempted commission of the offence shall not, in the opinion of the justices before whom he or she shall be brought or appear as therein mentioned, exceed the age of sixteen years: and that the provisions of the said recited acts for summons, warrant to summon and apprehend, and all other the provisions applicable to the cases where any person whose age is alleged not to exceed fourteen years shall be charged with any such offence as in the said acts mentioned, shall extend and be applicable to all cases in which any person whose age shall not exceed sixteen years, shall be charged with any such offence as aforesaid: provided always, that nothing herein contained shall authorize or empower any justice or justices to order the punishment of whipping to be inflicted upon any offender whose age shall exceed the age of fourteen years.
11 & 12 Vict. c. 59.	
Recited acts extended to all cases in which the age of the person charged does not exceed sixteen years.	
Offenders above fourteen years of age not to be liable to punishment of whipping.	
Justice to ask whether accused wishes the charge to be tried by a jury.	II. And be it enacted, that one of the justices before whom any person shall be charged and proceeded against under this act or the hereinbefore mentioned acts, before such person shall be asked whether he or she has any cause to show why he or she should not be convicted, shall say to the person so charged these words, or words to the like effect: "We shall have to hear what you wish to say in answer to the charge against you; but if you wish the charge to be tried by a jury, you must object now to our deciding upon it at once;" and if such person, or a parent of such person, shall then object, the justices shall proceed with the charge as if the said acts had not been passed.
Act not to extend to Scotland.	III. And be it enacted, that nothing in this act contained shall extend to Scotland.

## COURT OF CHANCERY (COUNTY PALATINE OF LANCASTER) ACT.

13 &amp; 14 VICT. CAP. 43.

*An Act to amend the Practice and Proceedings of the Court of Chancery of the County Palatine of Lancaster.*—[29th July, 1850.]

AND be it enacted, that it shall be lawful for the Chancellor of the Duchy and County Palatine of Lancaster for the time being to appoint a fit and proper person resident within the County Palatine of Lancaster, to be and to be called "The Messenger of the Court of Chancery of the County Palatine of Lancaster," to attend upon the said County Palatine Court, and to execute the process thereof; and from time to time, upon the death, resignation, or removal of any such person to appoint a successor to the said office; and that the person so appointed as aforesaid shall hold his office during the pleasure of the said Chancellor, and may be removed in a summary manner, and may and shall receive such fees for executing the process of the said court as the said Chancellor and the Vice-Chancellor of the said County Palatine shall from time to time, by any general order to be made in pursuance of the provisions hereinafter contained, authorize and direct.

Power to  
Chancellor of  
the Duchy to  
appoint a  
messenger of  
the court.

## BOROUGH GAOLS ACT.

13 &amp; 14 VICT. CAP. 91.

*An Act to authorize Justices of any Borough having a separate Gaol to commit Assize Prisoners to such Gaol, and to extend the Jurisdiction of Borough Justices to all Offences and Matters arising within the Borough for which they act.*—[14th August, 1850.]

WHEREAS great inconvenience and expense have been found to result to cities and boroughs having or providing and maintaining at their own cost gaols or houses of correction, from the necessity of committing to the common gaol of the county in which such city or borough may be situated for trial at the assizes holden for such county persons charged with offences committed within the limits of such city or borough, and it is expedient that the law should be altered and amended: and whereas it is also expedient that justices of the peace acting for any city or borough should have the same powers and autho-



13 & 14 Vict.  
c. 91.

*Borough Gaols  
Act.*

Prisoners may  
be committed to  
borough gaols  
for trial at the  
Assizes.

rities in all respects with regard to offences committed and matters arising within the limits of such city or borough as justices of the peace for the county within which such city or borough is situated now have with regard to such offences or matters under or by virtue of any local or general act of Parliament: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act it shall be lawful for any justice of the peace acting for any city or borough now having or providing and maintaining at its own cost, or which shall hereafter have or provide and maintain at its own cost, a gaol or house of correction, to commit for safe custody to such gaol or house of correction, for trial at the assizes to be holden for the county in which such city or borough may be situated, any person charged before him with any offence, except murder, committed within the limits of such city or borough triable at such assizes, and the commitment shall specify that such person is committed under the authority of this act, and whenever any such person shall be committed to any such gaol or house of correction for trial at such assizes the keeper of such gaol or house of correction shall deliver to the judges of assize a calendar of all prisoners in his custody for trial at such assizes, in the same way that the sheriff of the county would be by law required to do if such prisoners had been committed to the common gaol of the county in which such city or borough may be situated; and the justice or justices by whom any person charged as aforesaid shall be committed shall deliver or cause to be delivered to the proper officer of the court the several recognizances, informations, depositions, and statements relative to such person at the time and in the manner that would be required in case such person had been committed to such county gaol.

Nothing to  
authorize  
justices to  
commit persons  
charged with  
murder to any  
other than the  
county gaol.

As to expenses  
incurred in  
maintenance of  
last-mentioned  
prisoners.

Prisoners  
committed to  
borough gaols  
to be removed  
to county gaol  
previous to trial.

Prisoners whilst  
under removal  
to be deemed to  
be in proper  
legal custody.

II. Provided always, and be it enacted, that nothing herein contained shall be construed to give any justice of the peace acting for any city or borough power to commit persons charged with murder to the gaol or house of correction of any city or borough for trial at the assizes to be holden for the county in which such city or borough may be situated, but such justices shall and they are hereby authorized and required to commit all such persons to the common gaol of such county for trial in such and the same manner as if this act had not passed: provided also, that the expenses properly incurred by such county in the maintenance, safe custody, and care of such last-mentioned prisoners so committed whilst in custody in such county gaol shall be borne and paid by such city or borough in the manner hereinafter provided with respect to prisoners removed to the county gaol for trial at the assizes.

III. And be it enacted, that all persons who may under the authority of this act be committed to the gaol or house of correction of any city or borough for trial at the assizes to be holden for the county in which such city or borough may be situated shall in due time be removed by the gaoler or keeper of such gaol or house of correction, with their commitments and detainers, to the common gaol of the county, in order that they may be tried at the assizes to be holden for such county, and such removal shall not be deemed or taken to be an escape.

IV. And be it enacted, that every prisoner so removed shall for and during the time of such removal, and also for and during such time as he shall be detained in the county gaol, be to all intents and purposes deemed and considered to be in the proper legal custody, notwithstanding

he may in effecting such removal have been taken out of the jurisdiction of the city or borough to the gaol or house of correction of which he may have been originally committed into any other jurisdiction, or out of the county in which such gaol or house of correction may be situated into or through any other county or division of a county; and no action or other proceeding shall or may be maintained by such prisoner or by any other person against the gaoler or keeper of the gaol or house of correction of any city or borough, or against the gaoler or keeper of the common gaol of the county, by reason or in consequence of such prisoner having been taken out of the jurisdiction of such city or borough into any other jurisdiction, or out of the county in which such city or borough may be situated into or through any other county or division of a county.

V. And be it enacted, that the expenses which shall be incurred by such county in the maintenance, safe custody, and care of every prisoner so removed whilst in custody in such county gaol, shall be calculated upon the same principle and in the same manner as provided by an act passed in the sixth year of the reign of Her present Majesty, intituled *An Act to amend the Laws concerning Prisons*, with respect to borough prisoners committed to a county prison where no special contract is subsisting between such borough and county relative to such prisoners; and such expenses, and all other expenses which may be incurred by such county in respect of every such prisoner, shall be paid by the council of such city or borough to the treasurer of such gaol or county; and the amount of all such expenses shall, in case of dispute, be settled by a barrister-at-law in the manner provided by the said act.

13 & 14 Vict.  
c. 91.

*Borough Gaols  
Act.*

Expenses of  
prisoners  
removed to  
county gaols to  
be calculated as  
provided by  
5 & 6 Vict.  
c. 98.

VI. And be it enacted, that an account in writing of the expenses due and payable, or claimed to be due and payable, in respect of the maintenance, safe custody, and care of such prisoners as aforesaid, shall be made out from time to time, and signed by the clerk to the visiting justices of the county gaol to which such prisoners shall have been committed, and delivered to the town-clerk of the city or borough within which the offences shall have been committed; and such account shall be conclusive against such city or borough, unless some objection shall be made in writing, and signed by the town-clerk of such city or borough, and delivered to the clerk of the said visiting justices, within one calendar month next after such account shall have been delivered to such town-clerk.

Account of  
expenses to be  
made out and  
signed by clerk  
to justices, and  
sent to town  
clerk of borough.

VII. And be it enacted, that whenever any person shall be convicted at any assizes of any offence committed within the limits of any city or borough having or providing and maintaining at its own cost a gaol or house of correction, for which offence such person shall be liable either to the punishment of transportation or imprisonment, it shall be lawful for the court, if it shall so think fit, to commit such person to such gaol or house of correction, in execution of his judgment; and in case of the commitment of any person either sentenced to transportation or pardoned for any capital offence on condition of transportation, all the powers, provisions, and authorities for the removal of offenders sentenced to transportation given or granted by any former act or acts of Parliament to sheriffs or gaolers shall be and the same are hereby extended and given to the gaoler or keeper of the gaol or house of correction in whose custody such offender shall be.

In cases of  
conviction for  
offences  
committed  
within limits  
of any city, &c.,  
court may  
commit offender  
to borough gaol.  
In case of  
commitment  
of persons.

VIII. And be it enacted, that all the provisions hereinbefore contained with reference to the removal of prisoners from any city or borough gaol to the county gaol for trial at the assizes shall be applicable and shall be

Provisions as to  
removal before  
trial to apply to

13 & 14 Vict.  
c. 91.

*Borough Gaols  
Act.*

removal after  
conviction.

Borough  
justices to have  
the same  
jurisdiction as  
county justices  
under any local  
act as to  
offences  
committed  
within the  
borough.

Interpretation  
of terms.

Extent of act.

Act may be  
amended, &c.

applied to the removal from the county gaol to any city or borough gaol of any prisoner who, having been convicted at the assizes, shall be committed by the court to such gaol or house of correction, in execution of his judgment.

IX. And be it enacted, that after the passing of this act the justices of every city or borough shall have the same jurisdiction with respect to all offences committed and matters arising within such city or borough as the justices of the county in which such city or borough is situate now have under or by virtue of any local or general act of Parliament; and such offences and matters shall be cognizable by one or more of the justices of such city or borough in the same manner as such offences and matters are now cognizable by one or more of the justices of such county: provided always, that in every case in which imprisonment may be awarded for or in respect of any such offences or matters aforesaid, or to enforce payment of any penalty, rate, sum of money, or costs imposed or made payable by or by virtue of any such general or local act or otherwise, such imprisonment may be awarded to take place in any gaol or house of correction to which the justices of the said city or borough now have or hereafter may have power to commit offenders.

X. And be it enacted, that throughout this act, where there shall be nothing in the subject or context repugnant to such construction, words importing the singular number only shall include the plural number, and words importing the plural number only shall include the singular number, and words importing the masculine gender only shall include females.

XI. And be it enacted, that this act shall extend only to England and Wales.

XII. And be it enacted, that this act may be amended or repealed by any act to be passed in this present session of Parliament.

# INDEX.

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## ABDUCTION.

It is no answer to an indictment under stat. 9 Geo. 4, c. 31, s. 20, for taking away a girl under the age of sixteen years, to show that the girl alleged to be abducted went voluntarily from her home in consequence of the persuasions of the prisoner, to a place at some distance, where she met the prisoner, and whence she went away with him without any reluctance.

*Semble*, the marginal abstract of *Reg. v. Meadows* (1 Car. & K. 399), is not law. *Reg. v. Kipps*, 167

## ACT OF PARLIAMENT.

Act for abbreviating, App. xlix.

## ADMINISTERING CANTHARIDES.

Not an assault, 138

## ADMINISTERING POISON.

Intent, 84

## ADULTERER.

Larceny by, 191

## APPEAL.

Costs of allowance, 452

## APPEAL, CRIMINAL.

Practice as to admitting prisoner to bail, 21

## ARSON.

### EVIDENCE OF INTENT.

Upon an indictment for arson, with intent to injure the person in occupation of the premises, the prisoner may be found guilty, although his intent is proved to have been to obtain a reward for giving the earliest intimation of a fire at the engine station.

Upon such an indictment it is not com-  
VOL. IV.

petent for the prosecutors to show that other fires, of which notice was given by the prisoner, were of a similar nature to the one in question, and different from those of which notice was given by other parties. *Reg. v. Regan*, 335

## ASSAULT.

### CONSENT.

A medical man, to whom a girl of fourteen years of age was sent for professional advice, had criminal connection with her, she making no resistance from a *bond fide* belief that the defendant, as he represented, was treating her medically.

Held, that he was properly convicted of an assault.

*Semble*, he might have been convicted of rape. *Reg. v. Case*, 220

1 VICT. c. 85, s. 11.

On an indictment for murder, evidence was given of long-continued violence and ill-treatment of the deceased by the prisoner, but the evidence of the surgeon went to prove that the cause of death was inflammation of the lungs, and that it was quite unconnected with the prisoner's conduct.

Held, that the prisoner might be convicted of a common assault. *Reg. v. Rook*, 400

By administering cantharides, 138  
To resist search warrant, 146

## BAIL.

Admitting person to, 21  
Practice as to, 444

## BANKRUPT.

Under the 5 & 6 Vict. c. 122, s. 24 (re-enacted by 12 & 13 Vict. c. 106, s. 233), which makes  
k

the advertisement in *The London Gazette* conclusive evidence of the bankruptcy and fiat, if the bankrupt shall not, within the periods therein mentioned after such advertisement, have commenced an action, suit or other proceeding, to dispute or annul the fiat, &c.; it is necessary to prove, as a condition precedent to putting the *Gazette* in evidence, that the bankrupt has not taken the steps mentioned.

The question of the sufficiency of such preliminary evidence is one of law for the judge to decide.

The production, by the Registrar of the Court of Bankruptcy, of the books containing the entries and minutes of the proceedings relative to the bankruptcy and the absence therein of all reference to any such step being taken by the bankrupt, together with the evidence of the solicitor to the fiat that he had no knowledge of any action having been brought to dispute the fiat.

Held, sufficient evidence to let in the *Gazette*.

On an indictment against a bankrupt and other persons for an offence under the bankrupt laws, the *Gazette* is evidence of the bankruptcy and fiat only as against the bankrupt himself, and not as against the persons indicted with him. *Reg. v. Harris*, 140

Indictment of for defrauding creditors, 101

Search warrant to discover goods of, 145

#### BASTARD.

Name of, in murder, 333

#### BASTARDY.

Indictment for disobedience to order of, 431

#### BOROUGH GAOLS.

New statute as to, App. liii.

#### BRIDGES, STATUTE OF.

##### LIABILITY TO REPAIR.

The Isle of Ely is a riding or division of a county within the Statute of Bridges, and its inhabitants are primarily liable to the repair of public bridges within it.

The corporation of the Bedford Level, for the purposes of drainage, had, in 1632, cut a drain across a public highway, and built a bridge to carry the highway over the drain. The drain, its banks, and the bridge were vested in the corporation:

Held, that as the act of cutting a drain rendered a bridge necessary, and that act was done primarily for private purposes, there was a continuing obligation on the

corporation to maintain that bridge: and that its public utility did not throw the burden of repair upon the inhabitants generally. *Reg. v. Inhabitants of Isle of Ely*, 281

#### BURGLARY.

##### INDICTMENT FOR, IN UNION WORKHOUSE.

In an indictment for burglary in the workhouse of a poor law union, the workhouse, being under the provisions of the stat. 5 & 6 Will. 4, c. 69, s. 7, may be described as the dwelling-house of the guardians of the poor of that union.

*Semble*, that the workhouse cannot be described as the dwelling-house of the master of the workhouse.

The indictment alleged that J. F., late of the parish of P., in the county of M., with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling-house of the guardians of the poor of the P. union, there situate, feloniously did break and enter.

Held, a sufficient description of the situation of the workhouse, the words "there situate" referring not to the union, but to the parish before mentioned. *Reg. v. Frewen*, 266

##### EVIDENCE OF.

On an indictment for burglary, where any part of the person of the prisoner is within the dwelling-house, no matter with what immediate intent, there is a sufficient entry to constitute the offence, and therefore, where the hand was proved to have been inside the house, it was held immaterial whether it was there for the purpose of lifting up a window, or of abstracting property. But where no part of the prisoner's body is inside the premises, but he introduces an instrument within it for the mere purpose of effecting an entry, and not with any other object,

*Semble*, the entry is not complete. *Reg. v. O'Brien*, 398

#### CASE.

For criminal appeal, rules for regulating, App. xi.

#### CHARITABLE GIFTS.

False pretence, &c. 198

#### CHEQUES.

Larceny of, evidence of, 336

CHURCH RATE.

RESISTING WARRANT OF DISTRESS.

Stats. 53 Geo. 3, c. 127, s. 7; 27 Geo. 2, c. 20, ss. 1, 3.

The 27 Geo. 2, c. 20, s. 1, applies to all warrants of distress for levying money ordered to be paid by any act of Parliament authorizing such distress, excepting those issued against Quakers; therefore a warrant of a justice under the 53 Geo. 3, c. 127, s. 7, for levying by distress and sale a sum of money ordered to be paid by two justices in respect of a church rate, ought not, except in the case of Quakers, to direct a sale "forthwith," but to impose the limitations prescribed by the 27 Geo. 2, c. 20, s. 1, of a time certain not less than four days, nor more than eight days. *Reg. v. Williams*, 87

CLERGYMAN.

Refusal to solemnize a marriage, 217

COINING.

POSSESSION OF COINING IMPLEMENTS.

Where coining implements were found in a house occupied by a man, his wife, and a child ten years of age, the jury were directed to acquit the child of a felonious possession.

If coining implements are found in a house occupied at the time by a man and his wife, the presumption is that they are in the possession of the husband alone, unless there are circumstances to show that the wife was acting separately and without her husband's sanction; they cannot both be convicted.

The fact of a wife attempting to break up coining implements at the time of her husband's apprehension, if done with the object of screening him, is no evidence of a guilty possession. *Reg. v. Boober & others*, 272

UTTERING COUNTERFEIT COIN.

Upon an indictment which charged an uttering and putting off of counterfeit coin, the evidence was that the prisoner went into a shop and asked to purchase some articles, putting down a counterfeit shilling in payment. The shopkeeper said it was a bad one; and the prisoner then left the shop, without the shilling or the goods.

Held that he was guilty of uttering. *Reg. v. Welch*, 430

COLLECTOR OF POOR RATES.

Embezzlement by, 208

CONCEALMENT OF BIRTH.

EVIDENCE OF.

A woman who places a living child in a place of concealment, and on subsequently revisiting that place finds the child dead, and leaves it there, is guilty of concealing the birth of a child, by a secret disposal of the dead body, within the meaning of the stat. 9 Geo. 4, c. 31, s. 14, although she does not actually remove the body, but merely replaces the clothing or other articles with which the concealment was effected or assisted. *Reg. v. Hughes*, 447

CONFESSION.

Evidence of, 54, 164

Practice as to, 270

CONSPIRACY.

TO PROCURE PROSTITUTION.

An indictment charged that A. B. and C. D. did between themselves conspire, combine, confederate, and agree together, wickedly, knowingly, and designedly, to procure, by false pretences, false representations, and other fraudulent means, one J. C., then being a poor child, under the age of twenty-one years, to wit, &c., to have illicit carnal connexion with a man, to wit, a man whose name is to the jurors unknown, *contra formam statuti*.

Held good, as disclosing an indictable offence at common law, and supported by the evidence stated in the case. *Reg. v. Mears and another*, 433

To defraud by false pretences, 390

Indictment for, to obtain money by false pretences, 390

Indictment for, to obtain money by false pretences, App. xiii.

Indictment for, to steal title deeds, App. xviii.

To obtain goods by false pretences, form of indictment for, App. xxxv.

CONVICTED FELON.

Disability of, 159

CORONER'S INQUISITION.

Practice as to cross-examination on, 269

COSTS.

Of prosecution for assault, 345

OF CRIMINAL APPEAL.

Practice as to, 452

**CRIMINAL APPEAL COURT.**

Jurisdiction of, 389  
New orders of, App. xi.

**CRIMINAL INFORMATION.**

Against magistrate for neglect of duty, 353

**CROSS-EXAMINATION.**

Practice of, 262, 269, 279

**CUTTING AND WOUNDING.**

On a prosecution for cutting and wounding, with intent to resist lawful apprehension, it is sufficient to show that the apprehension was in fact lawful. It is quite immaterial that the prisoner had no reason to believe that it was so. *Reg. v. Bentley*, 406

**DEEDS.**

**STEALING OF—EVIDENCE.**

The prisoner applied to a clerk of the prosecutor to procure him a deed which was in the possession of the latter. The clerk promised that he would do so, but he told his master of the request that had been made to him, and by his direction, he gave the prisoner the deed.

Held, that if the clerk gave the deed into the prisoner's hands the indictment could not be sustained, but that if the clerk put down the deed and the prisoner took it up the evidence was sufficient under an indictment on the above statute for stealing the deed. *Reg. v. Lawrence*, 438

Indictment for stealing, with counts for a conspiracy, App. xviii.

**DEMURRER.**

Practice in, 294, 359  
Final on felony, 243

**DEPOSITIONS.**

How to be taken, 76  
Of witness absent from illness, reading of, 166, 440, 441, 442  
On erroneous inquiries, practice as to, 269  
Admissibility of by witness on a charge against himself, 402  
Refreshing witness's meaning by, 451

**DISEASED CATTLE.**

Indictment for selling, form of, App. xiv.

**DRIVING CATTLE.**

**INDICTMENT—STAT. 31 GEO. 3, c. 31 (IRELAND.)**

An indictment for misdemeanor for driving away cattle, under colour of a civil bill decree, between sunset and sunrise, against the form of the statute, &c., should aver that the party did so fraudulently. *Reg. v. Fitzsimons*, 246.

**DRUNKENNESS.**

Defence of, on a charge of wounding with intent to murder, 55

**DUBLIN.**

**JURISDICTION IN.**

At a session of the court, held in August, 1848, a bill of indictment was found against the prisoner, by the grand jury of the county of the city of Dublin, for offences committed therein; at the next session, in the October following, before the indictment was proceeded on, the Attorney-General, under the provisions of the statute 6 Geo. 4, c. 51, sent up a fresh bill against him, for the same offence, to the grand jury of the next adjoining county, which was found a true bill, and obtained an order that the first indictment be quashed, and obtained a writ of *habeas corpus* to transfer the prisoner from the custody of the sheriff of the city to that of the county sheriff.

Held, that the words "any prosecutor" in the 3rd section, being large enough to embrace prosecutions at the suit of the crown, the second bill of indictment was regularly preferred in the next adjoining county. But that the prisoner could not then be compelled to plead it, the *habeas corpus* to transfer him to the custody of the county sheriff not having issued, pursuant to the 6th section of the act, ten days before the holding of the sessions. *Reg. v. Duffy*, 117

**EMBEZZLEMENT.**

**FRIENDLY SOCIETY.**

In an indictment against a clerk, stating that he, being then and there employed as clerk to A. B. and others, did by virtue of his said employment, then and there, and whilst he was so employed as aforesaid, receive and take into his possession certain money, to wit, 29*l.* 15*s.* 8*d.*, for and on account of the said A. B. and others his masters, and the said money then and there fraudulently did

embezzle, averring the said money to be the property of the said A. B. and other his masters, from the said A. B. &c. feloniously did steal, &c. The 2nd count stating the person to be employed as clerk to A. B., C. D., and E. F., and laying the property in them;

Held, first, that it was sufficient to warrant a conviction for embezzlement, to prove that the prisoner was employed as secretary of a friendly society, and had not duly accounted according to the rules of the society, and that having taken upon himself to collect moneys, he was answerable as a servant for embezzling such moneys. Secondly, that although the prisoner was himself a member of the society, by the rules, all the property of the society being vested in trustees, he was guilty of embezzling a portion of the funds, and the property was rightly laid in the indictment as the property of the employers. Thirdly, it was not material whether the prisoner received payment for the discharge of the duties he undertook or not, because, being the servant of the society, he was answerable for the due discharge of any office he undertook to perform. *Reg. v. Murphy*, 100

A member of, and secretary to, a benefit society, deriving a per centage from the funds of the society, received, in the course of his duty, certain moneys from the members of the society, which it was his duty to pay into an account in the savings bank, kept in the names of certain other members of the society. Instead of paying the money into the bank, he appropriated it.

Held, that he could not be convicted of embezzling the money upon an indictment charging him to be the servant of "A. B. and others," and laying the money to be that of "A. B. and others," A. B. being an ordinary member of the society. *Reg. v. Taffs*, 169

#### FRIENDLY SOCIETY—INDICTMENT.

The secretary of an unenrolled friendly society, whose duty it is to receive the weekly contributions of the members, to enter them in a book, and hand over the amount to the treasurer, who in his turn pays it into a bank in the names of the trustees of the society, may be properly described as the servant of the trustees in an indictment charging him with embezzling sums so received, and he cannot be described as the servant of the treasurer.

Where, in an indictment for embezzlement, there is a second count charging another act of embezzlement within six months from the

first, under the act 7 & 8 Geo. 4, c. 29, s. 48, but alleging the money to be the property of a different person from that mentioned in the first count, the words connecting the second count with the first may be rejected as surplusage, and the second count dealt with as an independent count. *Reg. v. Woolley*, 251.

Where, by the rules of certain unenrolled friendly societies, the members of one lodge were at liberty to pay their contributions to another lodge, if more convenient to them so to do:

Held, that in an indictment against the secretary of a lodge for embezzling moneys received from a member of another lodge, the moneys may be laid as the property of, and the prisoner may be alleged to be clerk and servant to, the trustees of his lodge, to whose account all moneys received by him ought to be paid, although the trustees, in their turn, would, in this instance, have to account to the other lodge for the particular sum received on its behalf.

The secretary of an unenrolled friendly society, who is paid a yearly salary out of its funds, is properly described in the indictment as clerk and servant to the trustees, and it would be incorrect to designate him as employed in the capacity of clerk and servant. The latter description only applies, where the prisoner is employed on temporary occasions, and does not usually fill the situation of clerk or servant. *Reg. v. Woolley*, 255

#### COLLECTOR OF POOR RATES.

A person employed by the overseers of a parish to collect the poor rates, received the amount of rate due in respect of certain property from the landlord, whose name was not in the rate book, but who was in the habit of paying the rates, instead of the occupier, who was the person rated, and embezzled the same.

Held, that he was properly convicted of embezzlement, upon an indictment charging him as a servant to A. B. and C. D. (the overseers), and describing the money collected as the property of the said A. B. and C. D., his masters. *Reg. v. Adey*, 209

If a servant receives from his master goods for the purpose of selling them, and he appropriates them to his own use, he is guilty of larceny, not embezzlement. *Reg. v. Hawkins*, 224

#### EVIDENCE.

Where the witness had been cross-examined by



the attorney for the prisoner, the deposition was allowed to be read in the absence of the witness from illness, although no part of the cross-examination had been taken down, and only such part of the whole examination as the magistrate's clerk deemed to be material. *Reg. v. Hendy*, 243

A witness having stated that, by inquiries, he traced the prisoners from place to place :

Held, that the witness might properly say that he made inquiries, and in consequence of directions given to him in answer to those inquiries, he followed the prisoners from place to place until he apprehended them. *Reg. v. Wilkins*, 92

#### DEPOSITION OF ABSENT WITNESS.

A witness who had been examined before the magistrate, came up five miles from the country and gave her evidence before the grand jury. She went back at night, and returned in the morning for two days, during which she was waiting for the trial to come on. At the trial, on the third day, it was proved that she had been attacked that morning with a bowel complaint, and that when the policeman left her residence early on that day, she was unable to travel.

Held, that her evidence was not admissible. *Reg. v. Norris*, 440

A witness who had been examined before the magistrates was proved at the trial to have been delivered of a child a week before that day, and that she was unable to travel,

Held, that under the 11 & 12 Vict. c. 42, s. 17, her deposition might be read. *Reg. v. Harney*, 441

A witness who had been examined before the magistrates was proved at the trial to have been in bed the night before with a cold and inflammation, and that on a person calling at his house that morning, he had been told he was very bad.

Held, that the deposition could not be read. *Reg. v. Ulmer and another*, 442

#### PRISONER'S STATEMENT.

If, upon the trial of an indictment, the depositions taken before the committing magistrates contain a statement by the accused, in the form (N.), given in the schedule to 11 & 12 Vict. c. 42, that statement is admissible in evidence on the part of the prosecution, without further proof.

If the statement is not taken in that form, it may still be given in evidence against the

prisoner, upon proof of the signature of the magistrate, and that the statement was read over to, and signed by, the prisoner. If it should appear that any inducement or threat had been held out to the prisoner before he was taken before the magistrate, then, in order to let in evidence of a statement made before the magistrate, it would be necessary to prove that he was then cautioned by the magistrate, in such a manner as to remove the effect of the previous threat or inducement; but the particular enactment contained in the first proviso to sect. 18, is directory only. *Reg. v. Sansome*, 203

A prisoner, when before the magistrate on his first examination, was addressed by him in the language of the earlier part of the 18th section of the 11 & 12 Vict. c. 42, but the caution contained in the proviso was not given, and the prisoner made a statement which was taken down, but not signed by either him or the magistrate. On his second examination, after a few additional questions had been put to some of the witnesses, and their depositions had been read over, the prisoner was addressed by the magistrate as before, and he then declined saying any thing.

Held, that his former statement was admissible.

*Semble*, per Alderson, B., that the proviso in the 18th section of 11 & 12 Vict. c. 42, is merely meant to apply where there has been some promise or threat held out to the prisoner which would have rendered his statement inadmissible against him; and that the effect of giving him that caution, is to render such statement evidence notwithstanding such promise or threat. *Reg. v. Bond*, 231

#### CONFESSION.

A voluntary confession, which enters into minute details of a crime, and states that the prisoner was one of the party concerned in its commission, is evidence to go to a jury when the *corpus delicti* is proved by evidence *aliunde*, although the witness proving such *corpus delicti* swears that the prisoner was not of the party engaged in the commission of the crime. *R. v. Sutcliffe*, 270

A statement elicited from the prisoner by questions put to him without any previous caution by a magistrate, before whom he is brought in custody upon a criminal charge, is not admissible against him in evidence at his trial. *Reg. v. Pettit*, 164

An inducement or threat offered by a master to one of two apprentices jointly accused of larceny will not, though offered in the presence of the other, preclude the reception in evidence of a confession immediately made by the other. *Reg. v. Jacobs and another*, 54

#### CROSS-EXAMINATION.

If upon a trial a witness makes a statement which does not appear in his deposition, he may be asked, on cross-examination, without his deposition being put in, whether he ever made such a statement before. *Reg. v. Moir*, 279

#### DEPOSITIONS.

Where, on cross-examination, a witness is asked, with permission of the judge, to look at his deposition before the committing magistrate, and say whether he still adheres to his present statement, and it appears the witness is unable to read, the depositions cannot be read to the witness for the same purpose without being put in as evidence. *Reg. v. Matthews*, 93

A witness cannot be asked, on cross-examination, whether, when he was examined before the magistrate, he recollected such and such a particular fact. *Reg. v. Newton*, 262

#### OF HANDWRITING.

A policeman who has only once seen a prisoner write, and that since suspicion has been excited against him with reference to the charge upon which he is tried, and upon an opportunity taken by the policeman with the view of being able to speak to his handwriting, is not an admissible witness to prove that a document, the foundation of the charge against the prisoner, is in the prisoner's handwriting. *Reg. v. Crouch*, 163

#### OF INSANITY.

On a trial for murder, evidence was called on the prisoner's behalf, to prove his insanity. A physician, who had been in court during the whole trial, was then called on the part of the prosecution, and asked whether, having heard the whole evidence, he was of opinion that the prisoner, at the time he committed the alleged act, was of unsound mind?

Held, notwithstanding the opinion of the judges in *Reg. v. McNaghten* (1 C. & K. 130), that such a question ought not to be put, but that the proper mode of examination was to take the particular facts, and assuming them to be true, to ask the witness

whether, in his judgment, they were indicative of insanity on the part of the prisoner at the time the alleged act was committed? *Reg. v. Frances*, 57

Where a prisoner sets up insanity as a ground of defence, one cardinal rule is, that the burden of proving his innocence on that ground rests on the party accused. The question in such a case for the jury, is not whether the prisoner was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind.

The jury may come to a conclusion on this point from the conduct and acts of the accused shortly before and down to the commission of the alleged crime. Although insanity on one point, for instance, a delusion as to property, will not exempt a party from responsibility, the fact is not immaterial in considering his responsibility at another time and on another subject. The want of motive for the commission of the crime, and its being committed under circumstances which renders detection inevitable, are important points for the consideration of the jury, when coupled with evidence of insanity on any other particular point.

To ask a witness whether, in his opinion, the prisoner is capable of judging between right and wrong, is an improper question, for that is what no witness thought of, or is prepared to answer. *Reg. v. Leyton*, 194

On an issue as to the state of mind of a testator, a medical man, conversant with cases of insanity, cannot be asked his opinion as to the insanity of the testator, founded upon the evidence given at the trial in his hearing. *Doe dem. Bainbrigg v. Bainbrigg*, 454

#### BY ONE PRISONER FOR ANOTHER.

A prisoner, who pleads guilty is a competent witness on behalf of another prisoner indicted jointly with him. The proviso in the 6 & 7 Vict. c. 85, declaring that the provisions of that act shall not render competent any party to any suit, action or proceeding individually named in the record, relates only to civil proceedings. *Reg. v. Arundel and Smith*, 260

Of false pretences, 7, 198, 277

Of forgery of warrant or order, 13

Of perjury, 17

Of drunkenness on a charge of wounding with intent to murder, 55

Of larceny, 82

Of forgery, 90

Of embezzlement, 101

Of prisoner's statement before justices, 147

On indictment of a fraudulent bankrupt, 148

Of guilty receiving, 211, 412  
 Of threatening letter, 243  
 Of forgery of request for payment of money, 258  
 On an indictment for returning from transportation, 263  
 Depositions on coroner's inquisitions, 270  
 Of possession of coining implements, 272  
 Of larceny by servant, 274  
 Of intent in arson, 335  
 Of larceny of a cheque, 336  
 Of burglary, 398  
 Of intent in murder, 399  
 Depositions of witness, admissibility of against himself, 402  
 Of uttering counterfeit coin, 430  
 Of stealing a deed, 438  
 Of concealment of birth, 447  
 Of manslaughter, 449  
 Refreshing memory by depositions, 451  
 Of murder, 455

#### FALSE ENTRY.

Of birth of a child, 49

#### FALSE PRETENCES.

Where, in an indictment for obtaining money by false pretences, under the above circumstances, it was alleged that the false pretences were made to A. B., and by means thereof the money obtained from the said A. B.

Held, that this averment was supported by evidence that the above-mentioned false certificate was presented by the defendants to A. B., the secretary of the lodge, and that he accompanied them to C. D., the treasurer, from whose hands the money was received; he being merely the mechanical medium, and the secretary the responsible party. *Reg. v. Rouse and others*, 7

#### VENUE IN.

To procure a mere voluntary charitable gift by false pretences is an offence within stat. 7 & 8 Geo. 4, c. 29, s. 53.

An indictment charged the defendant with obtaining by false pretences, in one count, a post-office order, in another, a 5*l.* bank-note, and in a third two pieces of paper, to wit, two halves of a 5*l.* bank-note of the value of 1*s.* It was proved that the prosecutor, at the request of the prisoner, transmitted through the post a letter containing a post-office order:

Held, that the defendant was properly tried in the county in which that letter was

posted, though it was received by the prisoner in a different county.

It was also proved that he sent through the post two halves of a 5*l.* bank-note, one of which was received in the county of W., the other in the county of M.:

Held, that the half notes were of sufficient value to sustain a conviction upon the count charging the receipt of two pieces of paper. *Reg. v. Jones*, 198

#### WHAT IS.

Any false statement of an alleged existing fact fraudulently made for the purpose of obtaining money, and by which money is obtained, is a false pretence within stat. 7 & 8 Geo. 4, c. 29, s. 53, although the prosecutor might, by the exercise of reasonable caution, have detected the imposition. The question is for the jury, whether, in truth, the false statement did impose upon the prosecutor, and induce him to part with his money?

Therefore, the secretary of a society of Odd Fellows, who had falsely pretended to one of the members that he owed to the society more than in truth he did owe, and obtained money thereby, was held properly convicted under that statute. *Reg. v. Woolley*, 193

#### INDICTMENT.

Where a written instrument is employed as a part of the false pretence, whereby money or goods are fraudulently obtained, it is not necessary to set out the instrument in the indictment, unless some legal description is given to it, the accuracy of which it may be material for the court to decide:

Held, therefore, that an indictment which simply alleged that the defendant falsely pretended that a certain printed paper, which he then produced, was a good and valid promissory note, was sufficient, without setting out the printed paper. *Reg. v. Coulson*, 227

#### PLEA OF INFANCY.

On an indictment against a defendant for obtaining goods by falsely pretending that he was of full age, a plea of infancy in an action brought against him is not admissible for the purpose of proving that he was a minor. *Reg. v. Simmonds*, 277

#### CONSPIRING TO DEFRAUD BY.

Upon a prosecution under the 8 & 9 Vict. c. 109, s. 17, for obtaining money by fraudulently playing at a certain game:

Held, that there must be fraud, unlawful device, or ill practice during the game, and

it is not sufficient that fraud was resorted to, to induce the prosecutor to play.

*Quære*, Whether skittles is a game within the above statute?

Where several persons confederated and combined together to play at skittles, so that the play of one of them should betoken his skill to be much less than it really was, in order that the prosecutor (a looker-on) might be induced to play with him, and thereby lose to him his money:

Held, an indictable conspiracy. *Reg. v. Bailey and others*, 390

Indictment for obtaining money by pretending to be empowered to collect subscriptions for a society, App. iii.

Indictment for, form of, App. xiii., xxxiii.

Indictment for conspiring to obtain goods by, form of, App. xxxv.

## FOREIGNERS.

Trial of, 31

## FORGERY.

The mutual promises and engagements of any society are "authorized by law," within the 57 Geo. 3, c. 19, s. 25, unless they are clearly prohibited by law, and the party objecting to the legality of such promises or engagements must show their illegality.

In order to constitute the crime of forgery of a warrant or order for the payment of money under the 11 Geo. 4 & 1 Will. 4, c. 66, s. 3, it is necessary that the instrument be such that, if genuine, it would, in the ordinary course of business between the parties, be effectual for the payment of money.

By the rules of a society of Odd Fellows, having a branch called the "Conqueror Lodge," the family of deceased members of the branch lodge became entitled to a sum of money on the presentation of a certificate (filled up according to a certain form) to the secretary of the head society. After the dissolution of the "Conqueror Lodge," a forged certificate, purporting to relate to the death of a member of that lodge, was presented to the secretary, and a sum of money paid under it.

Held, that an indictment for forgery or uttering the certificate could not be sustained, there being, at the time it was forged and uttered, no such branch lodge or society in existence. *Reg. v. Rouse and others*, 7

An instrument in the following form: "Please to pay T. E. Turberville 3l. 12s. 6d. for sick-

VOL. IV.

pay paid to Brother Isaac Jones," and signed by the officers of a friendly society, and directed to the treasurer, is, on the face of it, an order within the stat. 11 Geo. 4 & 1 Will. 4, c. 66, s. 3, and may be shown by evidence to be a warrant for the payment of money, within the same statute.

Where a prisoner was charged with forging the above instrument, and some counts of the indictment laid the intent to be to defraud "J. C. and others," by virtue of the 11 Geo. 4 & 1 Will. 4, c. 66, s. 28, and it appeared that the prisoner, and J. C. and others, were members of the society:

Held, that the word "others" might be held to include or exclude the prisoner, according as it was necessary, for the support of the indictment, that his name should be considered as included or excluded.

Other counts of the indictment laid the intent to be to defraud W. R.

Held, that this intent was supported by proof, that W. R. was the treasurer of the society, and that it was the course of business and his duty to pay money, on having genuine orders or warrants for that purpose, in the above form. *Reg. v. Turberville*, 13

*Quære*, Is the uttering a forged instrument, with intent to defraud, without actual fraud being the result, any offence at common law? *Reg. v. Withers*, 17

An indictment recited that the corporation of the Trinity House were in the habit of examining persons voluntarily submitting to such examination, touching their nautical skill, and granting them certificates to act as masters; and that in order to enable persons to be examined and procure such certificates, it was necessary to produce to the examiners certificates of service, sobriety, and good conduct at sea, for not less than six years, and then charged the defendant that he, not regarding his duty, had forged certificates of the latter description, for the purpose of inducing the examiners to pass him.

Held, a good indictment for forgery at common law. *Reg. v. Toshack*, 38

## EVIDENCE OF.

Where a prisoner utters an instrument with a forged indorsement or other writing, and a short time previously the instrument is shown to have been in his possession without such indorsement, &c., there is some evidence of forgery, although there be no proof of the indorsement being in the prisoner's handwriting, or it be even shown that he is unable to write. *Reg. v. James*, 90

An indictment for forgery at common law alleged that the prosecutor had given to the defendant a consent by word of mouth, but not in writing, that his name might be used as next friend to certain infant plaintiffs in Chancery, on condition that he should not be answerable to the defendant (the solicitor for the said plaintiff,) for any costs; and it then charged that the defendant, intending fraudulently to make it appear that the prosecutor had consented that his name should be used as the next friend of the said plaintiff, absolutely and without any undertaking, promise, or agreement on the part of the said defendant touching the costs attending the said cause, forged a consent in these words:—"Miles v. Miles.—I hereby consent to be next friend to the infant for the purposes of this suit.—RICHARD SODEN."

Held, that there was a sufficient fraud disclosed on the face of the indictment.

On a trial for forgery, a defendant, who was for the first time in custody at the time when the trial began, is within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 24, and the court has jurisdiction to try him, although the offence was committed at a place out of the jurisdiction.

*Quære*, Whether a count for uttering at common law can be sustained, where no fraud has been actually perpetrated by such uttering? *Reg. v. Smythies*, 94.

#### WARRANT, ORDER, OR REQUEST FOR PAYMENT OF MONEY.

A document in the following form, "W. Trim, 2s.," is neither a warrant for the payment of money, nor a request for the delivery of goods, within the 11 Geo. 4 & 1 Will. 4, c. 66, ss. 3, 10, and cannot be shown to be so by parol evidence. An indictment, therefore, for forging a warrant for the payment of money, and (in another count) for forging a request for the delivery of goods, cannot be supported by proving a forgery of an instrument in the above terms, and by showing that the bearer, on presenting it at a shop, would, by the course of dealing between "W. Trim" and the shopkeeper, be entitled to receive goods to the amount of two shillings. *Reg. v. Ellis*, 258

#### INDICTMENT FOR.

If an indictment for forgery sets out the forged instrument in *hæc verba*, describing it as a warrant, order, and request for the delivery of goods, it is not necessary, in order to sustain the indictment, that the instrument should answer all the terms of that description. *Reg. v. Williams*, 356.

#### ENGRAVING PLATE.

Upon an indictment under the 1 Will. 4, c. 66, s. 19, for engraving on a plate several parts of a foreign promissory note, it is not necessary that the promissory note itself, of which they are alleged to be parts, should be set out.

The 2 & 3 Will. 4, c. 123, s. 3, does not apply to engraving; and counts, therefore, for forgery, which described certain parts of an engraved plate as they would be described in simple larceny, were held bad. *Reg. v. Faderman*, 359

#### FRIENDLY SOCIETY.

Forgery of warrant or order on, 7, 13  
Embezzlement from, 251, 255

#### GRAND JURY.

Qualification of, 172  
Practice of, 385  
Practice of, on a bill for joint murder, 455

#### GUARDIANS.

Liability of, for costs of prosecution for an assault, 345

#### HANDWRITING.

Evidence of, 163

#### HIGHWAY.

In an indictment against a parish for non-repair of a highway, an averment of the immemoriality of the highway is surplusage, and need not be proved, for the duty to repair sufficiently appears from the fact, that there is a highway in the parish out of repair. In an indictment for non-repair of a highway it was alleged, that from time whereof the memory of man runneth not to the contrary, there was and yet is, a common and ancient highway leading, &c., and that a certain part of the same Queen's common highway, situate, &c., on the 1st day of January, in the 12th year of the reign aforesaid, and continually afterwards until the taking of this inquisition, was, and yet is, in great decay, &c., so that the liege subjects, &c., could not, during the time aforesaid, nor yet can return, pass, &c.

Held, that though the averment of immemoriality were struck out, the indictment would show the existence of the highway, as such, at the time when the offence was alleged to have been committed. *Reg. v. Inhabitants of Turweston*, 349

When the subject-matter of an indictment of a public nature was referred before trial, and it was agreed that a verdict in conformity with the award should be entered on the application of either party :

Held, that the indictment itself was virtually referred; that the reference was illegal; and that an attachment for not paying the costs directed to be paid by the award ought not to issue. *Reg. v. Blackmore*, 352

#### HUSBAND AND WIFE.

Larceny by, 191

Joint receiving by, 272

Liability of, in coining, 272

#### INDICTMENT.

A mistake in the year of the Queen's reign in which the offence is stated to have occurred is cured by pleading over, and can only be taken advantage of on demurrer. *Reg. v. Fenwick*, 139

#### DESCRIPTION OF PROPERTY.

In an indictment for horse stealing, the animal, whether a horse, mare, gelding, colt or filly, may be described as a horse, although the statute 7 & 8 Geo. 4, c. 29, s. 25, mentions the particular species and gender. *Reg. v. Aldridge*, 143

#### VENUE.

Where an offence, committed within a limited jurisdiction, is tried in the adjoining county, under the stat. 38 Geo. 3, c. 52, s. 2, the venue in the margin of the indictment is properly laid in the county where the offence is tried, and there is no necessity for an averment in the body of the indictment to connect the county of the city or town within which the offence is alleged to have been committed, with the venue of the county from which the jury comes. *Reg. v. Stokes*, 451.

For forgery, 13, 94

For perjury, 17, 435

False pretences, 198, 227

Description of money in, 231

For driving away cattle, 246

For embezzlement, 251, 255

For returning from transportation, 263

For burglary in an union workhouse, 266

In whom property of partnership to be laid, 280

For non-repair of bridge, form of, 281

Laying name of bastard in murder, 333

Threatening to accuse of an infamous crime, 385

For conspiring to obtain money by false pretences, 390

For stealing and receiving, 409

For disobedience to order of sessions, 431

For joint receiving, 444

Giving copy of to prisoner, 445

For joint murder, practice as to, 455

For false pretences, form of, App. xiii.

For perjury in County Court, form of, App. xvi.

For selling a diseased cow, form of, App. xiv.

For stealing title deeds, form of, App. xviii.

For threatening to publish a libel, with intent to extort money, form of, App. xxii.

For equipping vessel for foreign service in war, App. xxvii.

#### INFANCY.

Plea of, in false pretence, 277

#### INSANITY.

Evidence of, 57, 149, 454

#### JOINT RECOVERY.

Indictment for, 444

#### JUDGE OF ASSIZE.

Jurisdiction of, 444

#### JURISDICTION.

##### OF COURT OF CRIMINAL APPEAL.

The Court of Criminal Appeal, under 11 & 12 Vict. c. 78, has no jurisdiction to decide questions raised by demurrer. *Reg. v. Faderman*, 359

Where, at the trial, a prisoner pleaded guilty to an indictment for larceny, setting forth a previous conviction, and the judge, feeling some doubt as to his power to pass sentence of transportation, reserved the case for the consideration of this court :

Held, that no question having arisen on the trial, and because the crown, or the prisoner, could bring a writ of error if a wrong sentence was pronounced, this court had no jurisdiction to entertain it.

The 9 Geo. 4, c. 54, s. 21, providing the penalty of transportation, when a prisoner is convicted of felony, not punishable with death, after a previous conviction for felony, is not repealed. *Reg. v. Byrne*, 248

Of Dublin city, 117, 153

#### JURY.

*De medietate lingue*, 31

Finding of, in an indictment for nuisance, 211

## JUSTICES.

Duty of, in taking prisoner's statement, 231

## LARCENY.

## PRETENDED HIRING.

If goods are delivered to a person on hire, and he takes them away, *animo furandi*, he is guilty of larceny, although no actual conversion of them by sale or otherwise is proved.

*Reg. v. Brooks*, 8 Car. & P. 295, is overruled.

A. hired a horse and gig with the felonious intention of converting them to his own use, and afterwards offered them for sale, but no sale took place.

Held, nevertheless, that he was guilty of larceny. *Reg. v. Janson*, 82

## HUSBAND AND WIFE—AVOUTERER.

If a wife leaves her husband for the purpose of an adulterous intercourse with another man, and there is a joint taking by them of the husband's goods, the man may be convicted of larceny. *Reg. v. Thompson*, 191

## DESCRIPTION OF MONEY STOLEN.

An indictment charged a prisoner with stealing several pieces of the current coin of the realm, and named all those coins in general circulation. The jury found him guilty of stealing some of the coins mentioned in the indictment, but they could not say which.

Held, that a conviction could not be sustained. *Per. Wilde, C. J., Alderson, B., Wightman, J., and Cresswell, J.; Erle, J., dissentiente. Reg. v. Bond*, 231

## BY SERVANT, EVIDENCE OF.

A shopman was authorized to sell his master's goods at the price marked upon them, but at nothing less; he sold a pair of trousers at a lower price than that marked, and embezzled the money.

Held, not to be a larceny of the trousers. *Reg. v. Brackett*, 274

## ALLEGATION OF OWNERSHIP.

On an indictment for larceny of notes and money from the person, it appeared in evidence that one partner in a firm resided in this country, and the other partner was permanently settled in Belgium. The partner residing here had the sole management of the partnership property, and the banking account was in his name. The notes and money alleged to have been stolen were the joint property of the firm.

Held, that the property was rightly alleged to be in the partner resident here. *Reg. v. Mole*, 280

## SHAREHOLDER—EVIDENCE.

A prisoner was a shareholder in an unincorporated company, and was employed as a salaried clerk by the directors, who appointed and dismissed clerks and other servants, fixed their salaries, and defined their particular duties. The salaries of the clerks were paid out of the funds of the company, and the directors had the charge and custody of all the company's books and papers. The course of business between the company and their bankers was, that the pass-books and paid cheques were returned weekly to the office of the former by their messenger, and it was the prisoner's duty to receive them from the messenger, and then to compare them with the books of the company. When this was done the cheques were to be preserved by the prisoner for the company's use. A cheque for 1,400*l.*, purporting to be drawn by the company upon their bankers, was paid by the prisoner into his own private bankers to his account. It was duly paid by the company's bankers, cancelled, and entered in the pass-book, and given in due course to the company's messenger with the pass-book, and he delivered them to the prisoner. Shortly afterwards, in consequence of suspicion attaching to the prisoner, search was made amongst his papers for the cancelled cheque, but it could not be found. The pass-book, when examined, showed that the entry of the 1,400*l.* cheque had been erased. There was no evidence to show that any person, on behalf of the company, had ever drawn the cheque in question, or that it had been drawn upon paper belonging to the company.

Held, sufficient evidence to support a count charging the prisoner with stealing a piece of paper, the property of Edward Goldsmid (one of the directors), and others. *Reg. v. Walls*, 336

An indictment contained two counts: one charged the prisoner with stealing the goods of A. B.; the other charged him with feloniously receiving "the goods aforesaid, so as aforesaid feloniously stolen." The jury acquitted the prisoner on the first count, but found him guilty on the second. It was objected, that "so as aforesaid stolen" meant stolen by the prisoner, which the jury had negatived:

Held, that the conviction was right, some of the judges being of opinion that the

verdict on the second count could not be defeated by the verdict on the first, even if the second count was to be taken as charging that the prisoner received goods which had been stolen by him; others thinking that the second count had not that meaning. *Reg. v. Craddock*, 409

Description of property, 143

What is, not embezzlement, 224

By servant of post-office, 275

Of a deed, evidence of, 438

### LUNATIC ASYLUM.

Indictment for keeping, without a licence, precedent of, App. i.

### MAGISTRATE.

#### CRIMINAL INFORMATION AGAINST.

Misconduct in his office may render a magistrate amenable to a criminal information, though he be not actuated by motives of pecuniary interest or personal malice,—as, if he gives way to passion so as clearly to interfere with the due administration of justice; but a mere display of ill-humour, or an error of judgment, such as the omission to administer an oath or to give a caution to a dying man before taking his examination, will not induce the court to interfere. *Reg. v. Barton*, 353

Duty of, in taking depositions, 76

### MANDAMUS.

To produce information on which search warrant was granted, 1

### MANSLAUGHTER.

An act of omission, as well as of commission, may be so criminal as to be the subject of an indictment for manslaughter.

Where a man, appointed to superintend a steam-engine employed in a colliery for the purpose of raising colliers from the pits, left the engine, in the charge of an incompetent person, and in consequence of that incompetence, death ensued:

Held, that the man leaving the engine was guilty of manslaughter. *Reg. v. Lowe*, 449

### MARRIAGE.

#### REFUSAL BY CLERGYMAN TO SOLEMNIZE.

To support an indictment for refusing to marry, there must be evidence that the parties desirous of being married presented themselves to the clergyman for that pur-

pose at a time and place at which the ceremony could be lawfully performed, and then requested him to marry them.

Where, therefore, upon the trial of such an indictment, it appeared that the only occasion upon which the parties offered themselves to him to be married was at nine o'clock in the evening, and not in the church:

Held, that this was not a sufficient tender of themselves to entitle them to proceed against the clergyman for his refusal, although he stated his ground of objection to be that the man had not been confirmed, and intimated his readiness to marry them whenever the man expressed a desire to be confirmed.

*Semble*, per Alderson, B., that if the refusal was wrong, the offence was an ecclesiastical offence only. *Reg. v. Moorhouse and James*, 217

### MASTER AND SERVANT.

Embezzlement, 255

### MISDEMEANOR.

Administering cantharides to a woman, with intent to injure her health, is not a misdemeanor at common law, neither is it an assault, nor within the statute 7 Will. 4 & 1 Vict. c. 85, making it felony to deliver any dangerous or noxious thing with intent to do grievous bodily harm. *Reg. v. Hanson*, 138

### MURDER.

#### INDICTMENT—NAME OF BASTARD CHILD.

In an indictment for the murder of a child, it was called in one count "Lewis Drake," in another "Lewis Tavern," and in a third, "a certain bastard male child, named Lewis." It was proved in evidence that the child had been called by its mother (whose name was Drake) and by its nurse "Lewis," and by that name alone it had been baptized. Its nurse had spoken of it to others as Lewis Drake. There was no proof that the mother was married. Her brother, who had lost sight of her for thirteen years, had never heard of her marriage.

Held, that there was evidence from which the jury might infer that the child's name was "Lewis Drake" or "Lewis" alone. *Reg. v. Drake*, 333

#### ATTEMPT TO.

Where a woman jumps out of a window for the purpose of avoiding the violence of her husband, and sustains dangerous bodily injury:



Held, that the husband cannot be convicted of an attempt to murder, unless he intended by his conduct to make her jump out of the window. *Reg. v. Donovan*, 399  
On charge of, prisoner may be convicted of a common assault, when, 400

#### INDICTMENT FOR, EVIDENCE OF.

If, upon a bill for murder against A. B. and C. D., the grand jury returns "a true bill against A. B. for murder," and "a true bill against C. D. for manslaughter," the finding is good as against A. B., and a nullity as respects C. D., and a fresh indictment for manslaughter should be preferred against the latter.

Where any person undertaking the duty of supplying an infant with proper food and clothing, and furnished with the means of discharging that duty properly, wilfully neglects to do so, with an intention to cause the death of the child, or to do it some grievous injury, and the child dies in consequence of such neglect, such person is guilty of murder.

Where the neglect is culpable only, and not malicious, such person is guilty of manslaughter.

Where a parent supplies sufficient food and clothing to another, for the purpose of administering to his child, and that other person wilfully withhold it from the child, and the parent is conscious that it is so withheld, and does not interfere, and the child dies for want of proper food and clothing, the parent is guilty of manslaughter. *Reg. v. Rook*, 455

#### MUTINY ACT.

##### DISOBEDIENCE TO BASTARDY ORDER.

Disobedience to an order of justices adjudging a man to be the putative father of a bastard child, and ordering him to pay a weekly sum for its maintenance, is "a criminal matter within the meaning of sect. 52 of the Mutiny Act (12 & 13 Vict. c. 10); and a soldier, therefore, is liable to be indicted, convicted, and punished for disobeying such an order, notwithstanding that section. *Reg. v. Ferrall*, 431

#### NAME.

Of bastard child, how laid, in murder, 333

#### NEGLIGENCE.

Manslaughter by, 449

#### NUISANCE.

##### FINDING OF JURY.

Upon an indictment for a nuisance at common law by obstructing a public navigable river, it is a question of fact for the jury whether the navigation was in fact impeded; and every unauthorized erection in a river is not necessarily an indictable obstruction. When, therefore, a jury found that the defendants were guilty of building a bridge, but that the erection did not obstruct or impede the navigation:

Held, that that was a verdict of acquittal. *Reg. v. Betts*, 211

#### OFFICE.

Indictment for refusing to execute. App. xxix.

#### OFFICERS.

Qualification of statute as to, App. i.

#### ORDER OR WARRANT.

Forgery of, 7, 13

#### PARTNERS.

Laying property of, 280

#### PERJURY.

An indictment for perjury at a County Court, alleged that a certain plaintiff, wherein W. W., "the younger" was plaintiff, &c., was tried. In the plaint book the plaintiff was described simply as W. W.

Held, no variance.

The variance of a letter in a warranty set out in a count for uttering it with intent to defraud, is one that can and may be amended by direction of the judge at the trial, independently of the statute 11 & 12 Vict. c. 46, s. 4.

An indictment for perjury alleged that the defendant swore that certain words were written by I. S. at the house of M. P. in the parish of S. M., &c., on, &c., whereas, in truth and in fact, the said words I. S. were not written by the said I. S. at the house of the said M. P., in the parish of S. M., on, &c.

Held, that this averment was supported by proof that the defendant swore that the words were written at the house of M. P., but that he did not describe the situation of the house, or mention the name of the parish. *Reg. v. Withers*, 17

## INDICTMENT.

An indictment for perjury alleged that one E. S. had filed a bill in Chancery against the defendant, J. C., and others, wherein he prayed that the defendant, J. C., might answer the premises, that a purchase by J. C. of certain property belonging to the other defendants might be declared fraudulent and void; and that it then and there became a material question whether the said J. C. did advise the said other defendants that the said property should be sold; and that the said J. C. falsely and corruptly swore, and in and by his answer denied that he had so advised.

Held, bad in arrest of judgment, for want of a sufficient averment of materiality. *Reg. v. Cutts*, 435

Indictment for, committed before Commissioners of Bankruptcy, precedent of, App. vi

Indictment for, committed in the County Court, precedent of, App. xvi.

## PIRATES.

Head money, as to, App. li.

## PLEA.

To an indictment for non-repair of a bridge, form of, 281

## PLEADING.

The prisoner pleaded in abatement that one of the grand jury, P. B., by whom the indictment was found a true bill, was not, at the time of his being sworn upon the grand inquest, nor at the time of the finding the bill of indictment a true bill, "an inhabitant of the county of the city of Dublin, or resident within the same, or a freeman of the city of Dublin, or a burgess of the said city, or seised or possessed of or entitled to any property within the said county of the city, in respect of which he, said P. B., was liable to be rated to the relief of the poor, or for county, parish or municipal rates or taxes."

Held, on demurrer, that the plea was bad, inasmuch as it did not negative the existence in the grand juror of every possible qualification, and he might consistently therewith be a good, honest and lawful man of the county of the city of Dublin.

*Semble*, that to an indictment two separate pleas may be pleaded in abatement.

*Semble*, also, per Perrin, J., that the statute of 3 & 4 Will. 4, c. 91, applies to grand juries at Commissions of Oyer and Terminer and General Gaol Delivery. *Reg. v. Duffy*, 172

## RESPONDEAT OUSTER.

A prisoner indicted for felony under the stat. 12 Vict. c. 12, may, after demurring to the indictment, if his demurrer be overruled, plead to the felony. *Reg. v. Duffy*, 24

After argument upon demurrer in a criminal case, it is in the discretion of the court to allow the demurrer to be withdrawn and a plea of not guilty entered.

*Semble*—Judgment for the Crown on a demurrer to an indictment for felony is not final, but one of *respondeas ouster*. *Reg. v. Smith*, 42

## INDICTMENT—DEMURRER, DUPLICITY, &amp;c.

The prisoner was indicted in six counts under the statute 11 & 12 Vict. c. 12. The 1st count charged that he, on the 3rd day of June, feloniously did compass, &c., to deprive and depose our Lady the Queen, from the style, honour, and royal name of the imperial crown of the United Kingdom; and the said felonious compassing, &c., then and there feloniously did express, utter, and declare, by then and there feloniously publishing a certain printing in a certain public newspaper called *The Nation*, which said printing is entitled "The Business of To-day" and contains among other things, according to the tenor and effect following, that is to say, &c. (setting out a portion of the article,) and in another part thereof according to the tenor and effect following, that is to say, &c. (setting out another portion of the same article.) And the said felonious compassing, &c., he said Charles Gavan Duffy afterwards, &c., on the 17th day of June, in the said 11th year, &c., did further feloniously express, utter, and declare, by then and there feloniously publishing a certain other printing in one other number of the said public newspaper called *The Nation*, which said last mentioned printing is entitled "The Uses of the Union," and contains, among other things, according to the tenor and effect following, that is to say, &c. (setting out a part of the second article and so on) charging the publication of other articles, and setting out portions of them. The 2nd count charged that the said C. G. D., &c., on the 3rd June, &c., feloniously did compass, &c., to deprive and depose the Queen; and the said last-mentioned felonious compassing, &c., did then and there feloniously express, utter, and declare by divers overt acts and deeds hereinafter mentioned, that is to say, in order to perfect, fulfil, and bring to effect his most evil and wicked felony and felonious compassing, &c., he the said C. G. D., on the 3rd day of June, &c., did feloniously publish in a certain other number

of a certain other public newspaper called *The Nation*, a certain other printing of and concerning a certain other treasonable revolution by him the said C. G. D. then and there feloniously devised and intended to be carried into effect by force of arms, and by traitorously levying war against our said Lady the Queen, and to deprive and depose our said Lady the Queen, &c., and of and concerning the said war intended to be levied as aforesaid, which said last-mentioned printing is entitled "The Business of To-day," and contains among other things according to the tenor and effect following, that is to say (selecting a portion of the article as in the 1st count) and further to fulfil, perfect, and bring into effect his said last-mentioned most evil and wicked felony and felonious compassing, &c., he the said C. G. D., afterwards, &c., and on the 17th day of June, in the year, &c., "did feloniously publish in one other number of the said public newspaper called *The Nation*, a certain other printing," &c., setting out a portion of the article entitled "The Uses of the Union," and then proceeding as in the 1st count.

The 3rd and 4th counts were similar, respectively, to the 1st and 2nd, but setting out the publications as overt acts. The 5th count charged that the prisoner, on the 3rd of June, in the 11th year of the Queen, feloniously did further compass, &c., to deprive and depose the Queen, and the said last-mentioned compassing, &c., did then and there feloniously express, &c., by divers overt acts and deeds hereinafter mentioned, that is to say, in order to fulfil, &c., his most evil and wicked felony, &c., he, the said C. G. D., on the said 3rd day of June, in the said 11th year of the reign aforesaid, and on divers other days and times after the said 3rd day of June, to wit, &c. (setting out the dates of the publications), feloniously did publish divers other printings in divers numbers of a certain public newspaper, called *The Nation*, of which he the said C. G. D. was the proprietor and publisher; and also divers other writings of him the said C. G. D., &c., the said last-mentioned printings and writings containing, amongst other things, incitements, encouragements, &c., to the liege subjects, &c., in that part of the United Kingdom of Great Britain and Ireland called Ireland, against our said Sovereign Lady the Queen to rise and rebel, and treasonably to depose our said Sovereign Lady the Queen from the style, &c., of the imperial crown of the United Kingdom, against the form of the statute, &c., and against the peace, &c. The 6th count,

which was similar in form, charged the intent to be to levy war :

Held, that the felonious publishings averred in the first four counts were sufficiently charged, and that it was not necessary to set out *verbatim* the entire of the printings or writings therein referred to :

Held also, that the counts were not double, by reason of several distinct publications being charged in each count :

And that publications were well laid as "overt acts" of the felony charged :

Held also, that as the intention charged against the prisoner was plainly expressed by the printings themselves, as set out in the indictment, no *colloquium* or *inuenendo* was necessary :

And also, that those portions of the counts which charged the expression of a felonious compassing on the 3rd of June, by publications on days subsequent to that date were insensible and repugnant. But that those overt acts which were ill laid might be rejected without vitiating the remaining portions of the counts. *Reg. v. Duffy*, 294

Plea of infancy, in false pretences, 277

Laying property of partnership, 280

#### POISONING.

A person who administers poison with intent to kill, is guilty of felony under section 2 of 7 Will. 4 & 1 Vict. c. 85, although, through ignorance or mistake, he administers it in a form which renders it innocuous.

The prisoner, with intent to kill, administered to a child nine weeks old, two *cocculus indicus* berries.

That berry is classed with narcotic poisons; but the poisonous property resides in the kernel, which is inclosed in a pod so hard, that it could not be digested by a child of that age. Therefore the pod rendered the poison innocuous.

Held, nevertheless, that he was properly convicted under the above section. *Reg. v. Cluderay*, 84

#### POOR RATES.

Embezzlement by collector of, 208.

#### POSSESSION.

By child in parent's house, 272

#### POST-OFFICE.

##### LARCENY BY SERVANT OF.

*Quere*, Whether a person in the employ of a tradesman, being a district postmaster, receiving wages for his trade services, but

neither being employed by, nor receiving any remuneration from, the Post-office, becomes, by assisting his master occasionally in sending the letters and making up the letter bags, a person employed by the Post-office, within the 7 Will. 4, & 1 Vict. c. 36.

But evidence that his master gave him a paper, and told him to go before the magistrate to take the oath usually taken by persons in the employ of the Post-office, and get the paper properly filled up—that he went away, and returned shortly after, exhibited the paper, and said that he had taken the oath, was

Held sufficient to show that he was in such employ. *Reg. v. Simpson*, 275.

### PRACTICE.

#### BAIL—JUDGE OF ASSIZE.

Where a judge of assize, who has the facts before him, orders a prisoner, against whom an indictment for murder is pending, to be detained in custody; it is against the practice of this court to reverse that order. *Reg. v. McAtavy and another*, 444

Where, on the trial of an indictment for felony, the counsel for the prisoner suggests that the interpretation of a written document is for the court, and their interpretation of it being against him, he asks to have the point reserved, and his request is acceded to, the jury being asked to decide upon the other facts of the case without reference to the construction of the document:

*Quere*, whether, after conviction, the verdict can be disturbed on the ground that the construction of the paper was for the jury, and that they have expressed no opinion upon a material point which was peculiarly for their decision? *Reg. v. Smith*, 43

#### CASE RESERVED.

Where the written case reserved does not, in the opinion of the counsel who were in it in the court below, fairly raise all the points that were in issue, the proper course is to apply to the judge reserving to amend it. *Reg. v. Smith*, 43

#### APPEAL—ADMISSION TO BAIL.

Where, after conviction by a jury at an assizes, questions of law have been reserved for the Court of Criminal Appeal, the prisoner will not be admitted to bail without the assent of the judge before whom he was tried. *Reg. v. Harris*, 21

VOL. IV.

### INCOMPETENCY OF WITNESS.

Where a bill for rape on a child under the age of ten years had been ignored by the grand jury, in consequence of the judge refusing to allow the child to be sworn as a witness, on the ground of its want of knowledge of the obligation of an oath, the prisoner was ordered to be detained in custody until the child could be properly instructed. *Reg. v. Baylis*, 23

#### COPY OF INDICTMENT.

Where the application is opposed by the Attorney-General, the court will not order a party indicted for embezzlement to be furnished with a copy of the indictments found against him, though they are very voluminous, and contain a great many counts, but

*Semble*, that in such case the court will order the accused to be furnished with a full bill of particulars. *Reg. v. Hughes*, 448

#### COSTS OF CRIMINAL APPEAL.

The court, which has been directed to pass sentence on a prisoner, after a point reserved for the decision of the Court of Criminal Appeal, has power to allow the costs incurred in the latter court, and upon taxation under an order to that effect, the briefs and fees of two counsel will be allowed. *Woolley*, 452

#### COSTS OF PROSECUTION.

Statute 5 Will. & M. c. 11, s. 3, is not confined to cases in which there is a legal obligation upon public officers to prosecute, but entitles them to costs if they institute a prosecution in obedience to a duty of imperfect obligation only.

An illegitimate child found straying in the streets, with marks of serious injury upon its person, was taken before a magistrate, who received evidence of acts of violence committed upon the child by its father, and recommended a prosecution. One of the relieving officers took the child to the workhouse, and the guardians of the union prosecuted the father for ill-treating the child; and although the father applied to them for the child, and offered to pay any expense which they had incurred, they refused to give it up to him. It turned out, upon the trial of the indictment, removed by the defendant into this court, that, in fact, the father had behaved generally with kindness to the child, though on one occasion he had punished it excessively, and the father was convicted of an assault:

Held, that the guardians were entitled to costs of prosecution, under 5 Will. & M. c. 11, s. 3, they being civil officers, who, as such, were concerned to prosecute. *Reg. v. Kenealey*, 345

#### CROSS-EXAMINATION.

There is no distinction between depositions before a coroner and before a magistrate with reference to the modes of cross-examination upon them. A witness cannot, therefore, be asked on cross-examination as to what he said before the coroner. But the deposition may be put into the witness's hands to read over to himself and refresh his memory. *Reg. v. Barnet*, 269

#### TAKING DEPOSITIONS BEFORE MAGISTRATE.

Upon the trial of an indictment for felony, a witness for the prosecution was asked by the prisoner's counsel whether he did not make a certain statement to the magistrate's clerk in answer to a question put by him in the absence of the magistrate and of the prisoner, whilst he (the clerk) was writing out the depositions from the minutes of the examination and cross-examination which had been previously taken before the magistrate, and put for the purpose of making the depositions more complete. The depositions, when written, were afterwards read over to the witnesses, and in the presence of the magistrate and the prisoner, to whom opportunity of cross-examining them was again afforded, the witnesses swore that they were true, and signed them.

Held, that even if the depositions so taken had, when re-sworn, the legal character of depositions, the prisoner's counsel was entitled to ask the above questions without putting them in, and the witness was bound to answer it; but—

*Semble*, that the documents prepared by the magistrate's clerk in the manner above described had not the legal character of depositions. *Reg. v. Christopher*, 76

#### DEPOSITIONS.

The deposition of a witness absent from illness, to be admissible under stat. 11 & 12 Vict. c. 42, s. 17, must be regular, and appear to have been regularly taken upon the face thereof, and cannot be proved by extraneous evidence to have been properly taken in fact. *Reg. v. Miller*, 166

The deposition of a witness before a magistrate cannot be put into his hands at the trial to refresh his memory on cross-examination. *Reg. v. Stokes*, 451

#### DEMURRER—RESPONDEAT OUSTER.

In an indictment for felony, the judgment on demurrer is final, and the prisoner is not allowed to plead over. *Reg. v. Hendy*, 243

#### DEMURRER.

Where one of several prisoners included in an indictment upon being arraigned has demurred to the indictment, the court will not allow the demurrer to be argued until the rest of the prisoners have pleaded or demurred.

A general demurrer to an indictment confesses the subject-matter of it, and judgment against a defendant on such a demurrer is final. *Reg. v. Faderman*, 359

#### DISABILITY OF CONVICTED FELON.

The Bishop of Ossory having instituted proceedings in the Ecclesiastical Court to remove the registrar of the diocese from his office in consequence of his having been convicted of forgery, and sentenced to transportation, the registrar moved for a prohibition to restrain the bishop from proceeding against him in the Ecclesiastical Court.

The court refused to grant the writ, holding, first, that the registrar being a convicted felon, was therefore disqualified from making the application: and secondly, that even if it were not so, the bishop was justified in proceeding by suit in the Ecclesiastical Court to deprive him of his office. *Grace v. Bishop of Ossory*, 159

#### TRIAL OF A FOREIGNER.

An alien female, married to a natural-born subject, becomes, by the 7 & 8 Vict. c. 66, herself a British subject, to all intents and purposes, and therefore, on an indictment for murder against her, she is not entitled to be tried by a jury *de medietate linguae*. *Reg. v. Manning*, 31

#### GRAND JURY.

Where the grand jury have ignored a bill, the court will not permit a second bill of a like nature to be presented to them at the same session. *Reg. v. Austin*, 385

#### INDICTMENT.

An indictment having been found against the prisoner by the grand jury of the county of the city of Dublin, at the August session of the court, which bill was not further proceeded on, the Attorney-General, under the provisions of the statute 6 Geo. 4, c. 51, preferred another bill against him for the same offence to the grand jury of the next

adjoining county, and the indictment found in the city was quashed, but notice of the change of jurisdiction was not served as prescribed by the statute.

Held, that the Attorney-General was not prohibited, by having indicted the prisoner in the county, from again resorting to the city jurisdiction.

But *semble*, that in such case the court will not allow both bills to continue pending against the prisoner. *Reg. v. Duffy*, 123

#### QUASHING INDICTMENT.

The court will not, on the application of the defendant, quash an indictment for perjury. An indictment cannot be quashed in part. *Reg. v. Withers*, 17

#### PRISONER'S STATEMENT.

Where a statement made by a prisoner before the committing magistrates appears on the face of it to have been duly taken under the statute 11 & 12 Vict. c. 42, s. 26, and is at the trial produced from the depositions of the witnesses taken at the same time, and appears to have been transmitted with them; it is receivable in evidence, without further proof. *Reg. v. Harris*, 147

#### PRISONER'S BAIL.

A prisoner against whom a bill has been found for murder, and who has applied for, and obtained, a postponement of his trial, will not be admitted to bail. *Reg. v. Langley*, 157

As to search warrant, 1

Prisoner may plead over after demurrer, 24

In demurrer, 42

As to putting depositions in hands of witness, 93

Indictment for forgery, 94

Indictment for embezzlement, 101

Indictment of bankrupt for making away with goods, 108

Pleading over, 139

As to grand jury, 172

Taking prisoner's statement before magistrate, 231

As to depositions of absent witness, 243

As to reserving case, 248

One prisoner may be evidence for another, 260

In cross-examination, 263, 279

As to admitting depositions, 402

As to reading depositions of witness absent from illness, 440, 441, 442

Of grand jury on a bill for murder against two, 455

#### PRECEDENTS.

Indictment and plea to same for non-repair of a bridge, under the statute of bridges, 281

Indictment for threatening to accuse of an infamous crime, 387

Indictment for conspiring to obtain money by false pretences, 390

Indictment for keeping a lunatic asylum without a licence, under 8 & 9 Vict. c. 100 (No. 1), App. i.

Indictment for obtaining money by falsely pretending that the defendant was the secretary to a society called "The Animal's Friend Society," and duly authorized to collect subscriptions on its behalf (No. 2), App. iii.

Indictment under 5 & 6 Vict. c. 31, s. 2, for shooting at the Queen with intent to injure her (No. 3), App. v.

Indictment for perjury committed before the Commissioners of Bankruptcy, with counts under 5 & 6 Vict. c. 122, s. 81 (No. 4), App. vi.

Indictment for conspiracy to obtain money by falsely pretending that the defendants were in a large way of business, requiring clerks and servants to conduct it, and then demanding, from those who offered themselves, money to be deposited as security for their good behaviour (No. 5), App. xiii.

Indictment for selling a diseased cow in a public market (No. 6), App. xiv.

Indictment for perjury committed on the trial of a cause in the County Court (No. 7), App. xvi.

Indictment under the 7 & 8 Geo. 4, c. 29, s. 23, for stealing deeds evidencing the title to real estate; with counts for conspiracy (No. 8), App. xviii.

Indictment under the 6 & 7 Vict. c. 96, for threatening to publish a libel with intent to extort money (No. 9), App. xxii.

Indictment under the 59 Geo. 3, c. 69, for equipping a vessel to be employed in the service of a foreign state against another state with which this country is at peace; with counts for conspiracy (No. 10), App. xxvii.

Indictment against an inhabitant of a ward in the city of London, for refusing to execute the office of one of the wardmote inquest (No. 11), App. xxix.

Indictment against a defendant for obtaining money by falsely pretending that he had then purchased certain property, which it was necessary he should immediately pay for (No. 12), App. xxxiii.

Indictment for a conspiracy to obtain possession of goods by false pretences (No. 13), App. xxxv.

Indictment for a conspiracy to defraud a railway company by travelling without a ticket on some portion of the line—obtaining a ticket at an intermediate station, and then delivering it up at the terminus as if no greater distance

had been travelled over by the passenger than from such intermediate station to the terminus (No 13\*), App. xxxviii.

Indictment against two defendants for obtaining money under false pretences, the false pretences being that one of the defendants having advanced money to the other on a deposit of certain title deeds, had himself deposited the deeds with a friend, and that he required a sum of money to redeem them; with counts for conspiracy (No. 14), App. xli.

Indictment for obtaining money, by falsely pretending that the defendant was the authorized agent of the Executive Committee of the Exhibition of the Works of Industry of all Nations, and that he had power to allot space to private individuals for the exhibition of their merchandize (No. 15), App. xlv.

#### PREVENTION OF OUTRAGE ACT.

In an indictment against a traverser, under 11 & 12 Vict. c. 2, for having in his possession, in a proclaimed district, fire-arms and ammunition, without licence, it was averred that the proclamation and notice required by the act had been duly published in *The Dublin Gazette*, and duly posted according to the provisions of the act. No proof of posting throughout the entire district mentioned in the proclamation having been given, and the traverser being convicted on case reserved, pursuant to 11 & 12 Vict. c. 78, for the Court of Criminal Appeal, the principal question was, whether it was necessary to prove the posting of the proclamation as directed by the 2nd section to sustain the conviction?

Held, that the 2nd count of the indictment, framed under the 9th section, was sufficiently sustained, as it was only necessary to prove the issuing of the proclamation to sustain a conviction for carrying arms contrary to the provisions of the 9th section, and that the averment "and duly posted" was an immaterial and unnecessary averment, which did not require to be proved, and might be struck out as mere surplusage, and that the conviction on the 2nd count was right. *Reg. v. Otway*, 59

#### PRISONER.

Practice as to, when a witness is too young to take an oath, 23

#### PRISONER'S STATEMENT.

Practice as to, 147, 203

#### PROPERTY.

Description of, in indictment, 143

Of partnership, in whom to be laid, 280

#### PROSECUTION.

Cost of, for assault, 345

#### PROSTITUTION.

Conspiracy to procure, 423

#### RAPE.

What is, 220

#### RECEIVING.

##### JOINT, BY HUSBAND AND WIFE—VERDICT.

Husband and wife were jointly indicted for feloniously receiving stolen property. The evidence proved a separate act of receiving by the husband. The jury returned a general verdict of guilty against both.

Held, that the verdict was divisible, and the conviction might be reversed as to the wife, and affirmed as to the husband.

The stolen property was found at the house in which the prisoners lived, when the husband was not at home; but afterwards, when the property was shown to him, he stated that he had bought it of A. B., who was in custody on the charge of stealing it.

Held, sufficient evidence of a receipt by him. *Reg. v. Matthews*, 214

##### EVIDENCE OF.

A. and B. having stolen two cocks and five hens, were seen, at four in the morning, to go into the house of C.'s father with a sack which contained the stolen property. C. lived with his father. A. and B. remained in the house about ten minutes, and were then seen to come out of the back door, preceded by C. with a candle, A., as before, carrying the sack, and to go into a stable situate in an enclosed yard at the back of the house. The stable door was shut by one of them; and on the policemen going in they found the sack lying on the floor, tied at the mouth, and the three men standing round it, as if they were bargaining, but no words were heard. C., on being charged with receiving the poultry, knowing it to have been stolen, said he did not think he would have bought the hens. C. being indicted for receiving, the jury were told that the taking of A. and B. with the stolen goods, as above, by C., into the stable over which he had control, for the purpose of negotiating about buying them, he well knowing the goods to have been stolen, was a receiving of the goods within the meaning of the statute.

Held, by Parke B., Alderson, B., Pateson, J., Coleridge, J., Maule, J., Platt, B., Talfourd, J., and Martin, B., that the direction to the jury was incorrect, and the conviction wrong; by Lord Campbell, C. J., Cresswell, J., Erle, J., and V. Williams, J., that the direction and conviction were right. *Reg. v. Wiley*, 412

Upon an indictment, which charged A. and B. with jointly receiving stolen goods, a joint receipt must be proved in order to convict both; but if a separate receipt by each is proved, that one may be convicted who is proved to have been guilty of the first separate act of receiving.

Therefore, where the evidence was, that A. alone had received the stolen property from the thief, near to the place where it was stolen, in the middle of the night in which it was stolen, and that B. was only found in possession of part of it the next day, at a considerable distance:

Held, that B. could not be convicted; for the allegation in the indictment was satisfied by the evidence of a separate receipt by A.; and the evidence of a subsequent receipt by B. ought not to be submitted to the jury. *Reg. v. Dovey and another*, 444

Indictment for, and for receiving, 409

## REGISTER.

### FALSE ENTRY IN.

In an indictment under the 43rd section of the 6 & 7 Will. 4, c. 86, for feloniously causing a false statement of the birth of a child to be inserted in a register, evidence that the prisoner came to the registrar and requested him to register a statement of a birth which was proved to be false, and it was so inserted by him, and the register completed:

Held, sufficient to support the indictment.

*Seemle*, the difference between the 41st and the 43rd sections of that act is, that the former contemplates a case where the false information has been given, but no insertion in the register made; the latter, where the information has not only been given, but acted upon and inserted by the registrar. *Reg. v. Dewitt*, 49

### RESPONDEAT OUSTER.

After demurrer, allowed, 24

Not allowed, on demurrer in felony, 243

### RIOT.

To resist search-warrant, 145

## SEARCH-WARRANT.

J. L., his house having been searched for treasonable documents, by virtue of a search-warrant, applied for a *mandamus* to compel the justice, who had signed the warrant, to produce the informations upon which it was issued, and to permit a copy of them to be taken, supporting the application by affidavits that there was no real ground for suspicion, and that the applicant believed that whoever swore the information was actuated by malice and ill-will.

Held, that such writ did not lie. *Reg. v. Browne*, 1

### UNDER 6 GEO. 4, c. 16, s. 29.

The 6 Geo. 4, c. 16, s. 29 (now repealed by the 12 & 13 Vict. c. 106), enacts that in all cases where it shall be made to appear to the satisfaction of any justice of the peace in England or Ireland, that there is reason to suspect and believe that the property of a bankrupt is concealed in any house, premises, or other place not belonging to such bankrupt, such justice of the peace is thereby directed and authorized to grant a search-warrant to the messenger under the fiat, and that it shall be lawful for such person to execute the same in like manner, and that such person shall be entitled to the same protection as is allowed by law in execution of a search-warrant for property reputed to be stolen or concealed. A search-warrant granted under the above section has the same force as an ordinary search-warrant delivered to a peace officer, and in justifying a seizure under it, it is not necessary to prove all the previous proceedings in the Court of Bankruptcy, or a right, in point of fact, to take the property sought for. *Reg. v. Roberts and others*, 145

## SERVANT.

Larceny by, 274

Of Post-office, larceny by, 275

## SHAREHOLDER.

Larceny by, of goods of company, 336

## SHOOTING.

### WITH INTENT, &c.

A., a constable, was set to watch a copse, from which wood had been stolen. He saw B. coming from the copse carrying wood, which he had stolen, and having no other means of apprehending him, shot at and wounded him. B. had been previously convicted



several times of stealing wood, so that he was in fact committing a felony when wounded; but A. had no knowledge of those previous convictions.

Held, that A. was guilty of shooting at B. with intent to do him grievous bodily harm. *Reg. v. Dadson*, 358  
Indictment for shooting at the Queen with intent to injure her, precedent of, App. v.

#### SOLDIER.

Exemption of, from arrest, 431

#### STATUTE.

##### CONSTRUCTION OF.

Where a statute creating an offence is repealed, a person cannot be afterwards proceeded against for any offence within it committed whilst it was in operation, even although the repealing statute re-enacts the penal clauses of the statute repealed.

The words "except as to the recovery and application of any penalty for any offence" which shall have been committed before the commencement of this act, in the first section of the 12 & 13 Vict. c. 106, do not apply to offences which are the subject of indictment, but refer to summary proceedings under which a pecuniary penalty may be awarded.

The penal clauses of the 5 & 6 Vict. c. 122, are repealed by the 12 & 13 Vict. c. 106.

Schedule (A) to the 12 & 13 Vict. c. 106, is controlled by the first section, so that the repeal of the 6 Geo. 4, c. 16, though expressed in the schedule to extend to the whole statute, has not the effect of reviving those statutes which the 6 Geo. 4, c. 16, itself repealed. *Reg. v. Swan*, 108

- 27 Geo. 2, c. 20, ss. 1, 3, p. 87
- 31 Geo. 3, c. 31, p. 246
- 53 Geo. 3, c. 127, s. 7, p. 87
- 57 Geo. 3, c. 19, s. 25, p. 7, 13
- 59 Geo. 3, c. 69, App. xxvii.
- 5 Geo. 4, c. 84, s. 22, p. 263
- 6 Geo. 4, c. 16, s. 29, p. 145
- 7 & 8 Geo. 4, c. 29, s. 23, App. xviii. p. 438
- 9 Geo. 4, c. 31, s. 20, p. 167
- 9 Geo. 4, c. 51, s. 21, p. 248
- 11 Geo. 4 & 1 Will. 4, c. 66, s. 3, pp. 7, 13
- 1 Will. 4, c. 66, s. 19, p. 359
- 2 & 3 Will. 4, c. 123, s. 3, p. 359
- 5 & 6 Will. 4, c. 69, s. 7, p. 2
- 6 & 7 Will. 4, c. 86, s. 41, 43, p. 49
- 7 Will. 4 & 1 Vict. c. 36, p. 275
- 7 Will. 4 & 1 Vict. c. 85, s. 2, p. 84
- 5 & 6 Vict. c. 122, p. 108
- 6 & 7 Vict. c. 96, App. xxii.

- 7 & 8 Vict. c. 66, s. 16, p. 31
- 8 & 9 Vict. c. 109, s. 17, p. 390
- 11 & 12 Vict. c. 2, p. 59
- 11 & 12 Vict. c. 42, s. 17, pp. 440, 441, 442
- 11 & 12 Vict. c. 46, s. 3, p. 411
- 11 & 12 Vict. c. 78, p. 59
- 12 & 13 Vict. c. 10, p. 431
- 12 & 13 Vict. c. 106, p. 108
- 12 & 13 Vict. c. 106, s. 233, p. 140
- 12 & 13 Vict. c. 76, 423

#### STATUTES (APPENDIX OF.)

Acts of Parliament, abbreviation, App. xlix.  
Qualification of officers, App. l.  
Pirates (head money), App. li.  
Larceny summary jurisdiction, App. li.  
Court of Chancery (County palatine of Lancaster), App. liii.  
Borough gaols, liii.

#### THREATENING

##### TO ACCUSE OF AN INFAMOUS CRIME.

On a charge of threatening to accuse of an infamous crime, it appeared that the prisoners had made a charge before a magistrate against the prosecutor of endeavouring to excite one of them to the commission of an unnatural offence.

Held, that the depositions of the prisoners upon that occasion were admissible in evidence against them.

When before the magistrate the prisoners were separately cross-examined as to their being together on the day when the offence was alleged to have been committed, how they had been occupied, &c., and their answers were so contradictory in themselves, and so inconsistent with each other, that the magistrate dismissed the charge against the then defendant, and bound him over to prosecute the prisoners for endeavouring to extort money by threats.

Held, that the answers elicited on such cross-examination were not admissible.

Under such circumstances, the judge will look at the depositions before they are read in court, in order that he may decide upon the materiality or non-materiality of the evidence.

Where the charge made by the prisoners was one specifically of an indecent assault:

Held, that it was for the jury to take into their consideration, not only the charge itself, but the conduct of the prisoners generally, for the purpose of deciding what was the nature of the accusation they intended to prefer. *Reg. v. Braynell and another*, 403

On an indictment for threatening to accuse of an infamous crime, with intent to extort a certain security for money:

Held, not necessary to aver to whom the security belonged. *Reg. v. Tiddeman and others*, 387.

#### THREATENING LETTER.

A letter addressed to the prosecutor, stating that a conspiracy has been entered into by certain persons to ruin him—that it will be shortly carried into effect, but that it is in the writer's power to prevent it, and that he will prevent it if a certain sum of money is deposited for him in a particular place by a specified time—is a threatening letter within the 7 & 8 Geo. 4, c. 29, s. 8. *Reg. v. Smith*, 43

#### EVIDENCE OF

The prisoner had sent to the prosecutor a letter, the language of which was ambiguous:

Held, that the prosecutor might be asked what appeared to him to be the meaning of the letter.

Evidence is admissible to show that, under the particular circumstance, the words in such a letter had not their ordinary meaning, but the meaning imputed to them upon the record, and therefore the witness might be asked whether he understood the meaning to be that which the record imputed. *Reg. v. Hendy*, 243

#### THREATS (ILLEGAL.)

Indictment for threatening to publish a libel, with a view to extort money, form of App. xxii.

#### TRANSPORTATION.

##### INDICTMENT FOR RETURNING FROM.

The offence of returning from transportation before the expiration of a sentence is made a felony by the stat. 5 Geo. 4, c. 84, s. 22. In an indictment for that offence it is necessary to aver that the prisoner was feloniously at large before the expiration of his sentence, and an indictment omitting the word "feloniously" is bad.

Under section 24 of the above statute, which makes a certificate of the conviction (omitting the formal part of the record) evidence, a certificate stating that "at the General Quarter Sessions of the Peace of our Lady the Queen, holden at M., in and for the county of K., on, &c., J. H., late of, &c., was in due form of law tried and convicted on a certain indictment against him, for," &c., is sufficient, without any more formal caption. *Reg. v. Horne*, 263

#### TREASONABLE PRACTICES.

Search warrant for, 1

#### UNION WORKHOUSE.

Indictment for burglary in, 263

#### UTTERING.

Of counterfeit coin, evidence of, 430

#### VARIANCE.

In perjury, 17

#### VENUE.

How to be laid, 451

In false pretences, 198

In indictment for burglary in a union workhouse, 263.

#### VERDICT.

Divisible on a joint indictment, 211

For stealing corn, 231

#### VESSEL.

Indictment for equipping for service of a foreign state, &c., under 59 Geo. 3, c. 69, form of, App. xxvii.

#### WARRANT OR ORDER.

Indictment for forgery, 356

#### WITNESS.

Absent from illness, as to reading depositions of, 166, 243, 441, 442

Incompetent from age, practice as to, 23

One prisoner may be, for another, 260

#### WOUNDING.

##### DRUNKENNESS.

How far on such an indictment proof of drunkenness on the part of the prisoner, at the time of the alleged act, should influence the jury in deciding the question of intent. *Reg. v. Monkhouse*, 55.

## INDEX TO APPENDIX.

## INDICTMENTS.

- | No.   | No.  |
|---|--|
| 1. For keeping a lunatic asylum without a licence, under 8 & 9 Vic. c. 100, i.  | execute the office of one of the ward-mote inquest, xxix.  |
| 2. For obtaining money by falsely pretending that the defendant was the secretary to a society called "The Animal's Friend Society," and duly authorized to collect subscriptions on its behalf, ii.  | 12. Indictment against a defendant for obtaining money by falsely pretending that he had then purchased certain property, which it was necessary he should immediately pay for, xxxiii.  |
| 3. Under the 5 & 6 Vict. c. 51, s. 2, for shooting at the Queen with intent to injure her, v.   | 13. Indictment for a conspiracy to obtain possession of goods by false pretences, xxxv.  |
| 4. For perjury committed before Commissioners of Bankruptcy, with counts under 5 & 6 Vict. c. 122, s. 81, vi.   | 13.* Indictment for a conspiracy to defraud a railway company by travelling without a ticket on some portion of the line—obtaining a ticket at an intermediate station, and then delivering it up at the terminus as if no greater distance had been travelled over by the passenger than from such intermediate station to the terminus, xxxviii. |
| 5. For conspiracy to obtain money by falsely pretending that the defendants were in a large way of business, requiring clerks and servants to conduct it, and then demanding, from those who offered themselves money, to be deposited as security for their good behaviour, xiii | 14. Indictment against two defendants for obtaining money under false pretences, the false pretences being that one of the defendants having advanced money to the other on a deposit of certain title deeds, had himself deposited the deeds with a friend, and that he required a sum of money to redeem them; with counts for conspiracy, xli.  |
| 6. For selling a diseased cow in a public market, xiv   | 15. Indictment for obtaining money, by falsely pretending that the defendant was the authorized agent of the Executive Committee of the Exhibition of the Works of Industry of all Nations, and that he had power to allot space to private individuals for the exhibition of their merchandise, xlv.  |
| 7. For perjury committed on the trial of a cause in the County Court, xvi.  |  |
| 8. Under the 7 & 8 Geo. 4, c. 29, s. 23, for stealing deeds evidencing the title to real estate; with counts for conspiracy, xviii.   |  |
| 9. Under the 6 & 7 Vict. c. 96, for threatening to publish a libel with intent to extort money, xxii.   |  |
| 10. Under the 59 Geo. 3, c. 69, for equipping a vessel to be employed in the service of a foreign state against another state with which this country is at peace; with counts for conspiracy, xxvii.   |  |
| 11. Indictment against an inhabitant of a ward in the city of London, for refusing to   |  |

## STATUTES.

- |  |  |
|--|--|
| 13 Vict. c. 21. An Act for shortening the Language used in Acts of Parliament, xlix.   | 13 & 14 Vict. c. 43. An Act to amend the Practice and Proceedings of the Court of Chancery of the County Palatine of Lancaster, liii.  |
| 13 & 14 Vict. c. 25. An Act to enable Queen's Counsel and others, not being of the Degree of the Coif, to act as Judges of Assize, l.  | 13 & 14 Vict. c. 91. An Act to authorize Justices of any Borough having a separate Gaol to commit Assize Prisoners to such Gaol, and to extend the Jurisdiction of Borough Justices to all Offences and Matters arising within the Borough for which they act, liii. |
| 13 & 14 Vict. c. 26. An Act to repeal an Act of the Sixth Year of King George the Fourth, for encouraging the Capture or Destruction of Piratical Ships and Vessels; and to make other Provisions in lieu thereof, li. |  |
| 13 & 14 Vict. c. 37. An Act for the further Extension of Summary Jurisdiction in Cases of Larceny, li.   |  |





